TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted] 2.

ED. JOHNSON, APPELLANT,

vs.

THE STATE OF TENNESSEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Filed March 30, 1906.

(20136.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 228.

ED. JOHNSON, APPELLANT,

vs.

THE STATE OF TENNESSEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print.
Petition for appeal	a	1
Transcript from Circuit Court of the United States for the Eastern District of Tennessee	b	1
Petition for writ of habeas corpus	b	1
Order to show cause	j	6
Answer of State of Tennessee	k	6
Testimony of Foster V. Brown	1	13
W. G. M. Thomas	11	18
J. P. Pemberton	39	33
N. W. Parden	43	35
M. N. Whittaker	50	39
S. D. McReynolds	58	43
Order dismissing petition, etc	69	49
Judge's certificate to bill of exceptions	70	50
Clerk's certificate to record	70	50
Order of Mr. Justice Harlan allowing appeal	70	50
Citation	72	51

14230—06 M——1

a In the Circuit Court of the United States for the Eastern District of Tennessee.

EX PARTE ED JOHNSON.

To the Hon. Supreme Court of the United States.

In the trial of this case on the 10 day of March, 1906, before the Circuit Court of the United States at Knoxville, Tennessee, your petitioner was ag'rieved by the order and judgment of said court dismissing his petition for a writ of habeas corpus, in this: That your petitioner, upon a trial of his case in the criminal court of Hamilton County, Tennessee, was denied his right of a public trial; was denied a trial by a fair and impartial jury, and was denied the aid of counsel, all in violation of the fifth and sixth amendments to the Constitution, and petitioner was also denied the rights secured him under the fourteenth amendment to the Constitution, in this: That he was denied by the State court the right of change of venue, and the right after his conviction of making a motion for a new trial and appealing his case to the State Supreme Court, which are provided for by the laws of the State.

He was also denied the right of setting up by plea *by* in abatement to the indictment, and by affidavit to challenge the array of trial jurors on account of the fact that the State jury law had excluded from the jury box the names of all persons of petitioner's race, he being a negro or a person of African de'cent.

Petitioner herewith presents an exemplification of th' sec' of this cause in the court below, duly certified. The day for petitioner's execution is set for March 20th, 1906, and he will be executed unless this honorable court grants him the writs of error and supersedeas, for which writs he now humbly prays.

ED (his x mark) JOHNSON.
[SEAL.] N. W. PARDEN.

Sworn to and subscribed before me the 15 of March, 1906.

J. W. WHITE, *Notary Public.*

b In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

ED JOHNSON,
v.
STATE OF TENNESSEE. } No. 1460.

Bill of exceptions.

Be it remembered that this cause was heard before the court on the 10th day of March, 1906, when the following proceedings were had:

The petitioner read his petition, which was as follows:

To the honorable judges of the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee:

Your petitioner, Ed Johnson, respectfully shows that he is a native born citizen of the United States and a resident and citizen of the

State of Tennessee, and that he is a negro or person of African descent.

That he is illegally restrained of his liberty by the sheriffs of Hamilton and Knox counties, Tennessee.

The cause or pretended cause of his restraint is as follows:

c At the last term of the Criminal Court of Hamilton County an indictment was found by an illegally constituted grand jury against your petitioner, charging him with the offense of rape.

He was, as will be hereinafter shown in detail, illegally and improperly put upon his trial for said offense and illegally and improperly convicted thereof and sentenced to death therefor.

The day of his execution was fixed for March 13th, 1906, and he is now being held in jail awaiting the arrival of the day of his doom.

Petitioner respectfully shows that under and by virtue of the provisions of the Constitution of the United States he was exempted from being compelled to testify against himself, and from deprivation of his life or liberty without due process of law.

He further avers that he was entitled to a speedy public trial by an impartial jury, and to have the assistance of counsel for his defense.

It is also provided in and by the Constitution that no State shall deprive any person of life, liberty, or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of its laws.

Petitioner avers that in his said trial and conviction his constitutional rights above enumerated were each and every one of them violated and set at naught. Petitioner was unable to employ counsel to defend him, and the judge of the criminal court appointed counsel for him, first appointing Mr. Robert Cameron, and afterwards appointing Mr. W. G. M. Thomas and Mr. Lewis Shepherd.

These gentlemen were members of the bar of Chattanooga and were lawyers of ability and gentlemen of integrity, and it is not in

d tended by anything that may be hereinafter said to reflect upon their integrity or ability, or upon their faithfulness to their trust or their energy and zeal in petitioner's behalf.

Petitioner avers that he is not guilty of the offense charged against him, and was arrested upon an unwarranted suspicion against him.

Yet, notwithstanding this fact, when petitioner was arrested and brought to jail in Chattanooga, which occurred in the last days of January, 1906, a mob, composed of several thousands of citizens of Hamilton County, Tennessee, assembled in Chattanooga and attacked the jail in a vigorous and determined manner, and endeavored to take petitioner out of the jail and murder him, and they were only prevented from murdering him by the heroic conduct of the sheriff of the county and the policemen of the city of Chattanooga, who after several hours of brave and strenuous resistance finally succeeded in beating back the infuriated mob.

A renewal of this attack was prevented by the fact that the sheriff privately removed petitioner from his jail and conveyed him to the jail at Nashville, Tennessee, where he was kept away from the mob until the day of his trial.

Some days before the day appointed for the trial petitioner's counsel had a meeting with the judge of the criminal court, the attorney-general, the mayor of the city, a leading minister of the gospel, and some other prominent gentlemen with a view to arrange to prevent mob violence when the trial should come off.

In that interview petitioner's counsel informed the judge and the attorney-general that he could not get a fair and impartial jury in Hamilton County to try his case; that the excitement against him was so high that he could not get a fair trial; that it was their duty to apply for a change of venue to another county, free from a like objection, and if they failed to make a case by affidavits and evidence for a change of venue, then they ought to make an application to continue the case until next term, trusting that the excitement and prejudice against the prisoner would subside.

The judge thereupon informed petitioner's counsel that he was not going to grant a venue, and that he was going to try the case and try it on the day fixed.

Petitioner's counsel were advised and informed in said meeting that if they made an application for a change of venue or to continue the case the mob would again attack the jail with more success than had attended their former effort, and would succeed in murdering petitioner.

It was stated these officials had caused an inspired article to be printed in the Chattanooga Daily Times, a most influential public journal, assuring the public that the prisoner would surely be tried on the day set for his trial, and that there would be no further delay; that in this way the fury of the mob had been restrained, and that if the petitioner sought a change of venue or a continuance the mob spirit would break out afresh and that petitioner and several other negroes in jail would be murdered.

Petitioner's counsel were alarmed by these threats made almost ex cathedra, and solely on account of the fear aroused by these threats they did not make an application for a change of venue or for a continuance.

The case was tried, and it was the most remarkable trial ever witnessed in a court of justice. It was not a public trial; the public was excluded from the court-house during the trial.

A cordon of policemen and deputy sheriffs was placed around the court-house, and no one was permitted to enter the court-house or grounds except jurors, witnesses, and a few favored lawyers.

The father, mother, and all other friends of the prisoner was shut out. All this was done by order of the judge presiding over said court.

In its progress the young lady upon whom the rape had been committed testified that she believed the petitioner was her assailant, and thereupon a juror burst out crying, and, with a wild jesture towards where the prisoner was standing, said: "If I could just get at him I would tear his heart out." At least two of his fellow jurors remonstrated with him, but the presiding judge did not rebuke him by word or jesture or disapproving look.

Petitioner was compelled to give evidence against himself in this way: He was seated in rear of his counsel while the young lady, Miss Taylor, was testifying. The court compelled him to get up from his seat and walk to a position in front of the witness stand and stand before her, and to put his hat on, to be examined and scrutinized by her before she answered the question propounded to her as to whether or not he was the man who had assaulted her.

The panel of jurors from which the grand and traverse were selected was illegally constituted.

The defendant under the Constitution was entitled to a jury of his peers.

The jury commissioners of Hamilton County had illegally refused to put the names of negroes in the jury box, although there were 5,000 negro males between the ages of 21 and 70 years in said county, more than three of whom were eligible for jury duty in respect to their intelligence, upright character, and property, etc.

The jury commissioners arbitrarily refused to put the names of any of them in the jury box, or if two or three of their names got in the box it was an accident which was remedied by the commissioners and judge as soon as the fact was discovered.

g

Practically and to all intents and purposes the names of these 3,000 eligible and qualified persons were excluded from the jury box solely because of the fact that they belonged to the negro race; they were excluded from the jury box solely because of their race, color, or previous condition of servitude.

Petitioner's counsel, in conference with the judge and attorney-general, informed them that they believed it to be their duty to plead in abatement to the indictment on account of the structure of the grand jury, and again they were told that if they made that question the mob would hang the petitioner. They were by these reasons and by this threat compelled to forego putting forward a good and substantial and meritorious defense to said indictment.

They also desired by affidavits to challenge the array of traverse jurors, and were informed that if they did so a mob would hang the petitioner.

After petitioner's conviction his counsel gave notice in conformity to the rule of the court that they would enter a motion for a new trial.

Then after the presiding judge appointed a committee of lawyers, composed of Mr. Foster V. Brown, Mr. Robert Pritchard, and Mr. John H. Cantrell, and directed petitioner's counsel to meet them at Mr. Cantrell's office to confer as to whether or not his counsel should pursue his defense further.

The conference was held, and it was the unanimous opinion of the advisory committee that if a motion for a new trial was made or an appeal taken by petitioner's counsel that the jail would be broken and petitioner slain that night. One of the advisers said that he had seen a leading citizen and property owner who said that he was opposed to a mob, but if petitioner took an appeal he would organize and head a mob to break the jail and hang petitioner that night.

h

Another said he had heard twenty-five leading men say since the conviction of petitioner that if an appeal was taken by petitioner they would join a crowd to murder him that night.

Petitioner is informed that Mr. Foster V. Brown is the only one of the advisers who gave his voice in favor of trying to secure a fair and impartial trial for petitioner by appealing his case.

After petitioner's counsel had heard the opinions of the judge's advisory committee they announced that they would lay the facts before their client and would do for him what he wanted done.

Thereupon they waited upon petitioner at the jail of Hamilton County and informed him of the appointment by the judge of the advisory committee and of the facts stated by them, and therefore petitioner said he was not guilty, but to avoid being killed by a mob and avoid the death at the hands of a mob of other members of his race he would submit and not try to appeal. Within a few minutes of this interview between petitioner and his counsel, he was brought into the court-house before the criminal judge and called upon to know what he had to say. He said he had nothing to say except "I am not guilty," but like a lamb led to the slaughter he was dumb.

The court thereupon proceeded to sentence him and directed the sheriff immediately to remove him to Knoxville, because it appeared to the court that it was unsafe to retain him in the jail of Hamilton County.

This occurred on Friday afternoon. On Monday morning his appointed counsel having ceased to act for him, Mr. S. L. Hutchins and Mr. N. W. Parden, lawyers, employed by petitioner's father with his approval to represent him, appeared before the Criminal Court and asked leave to file a motion for a new trial, and the court arbitrarily refused to allow said motion to be entered, and his counsel also moved the court to allow them to present a bill of exceptions and appeal from the judgment, and the court again arbitrarily refused to allow a bill of exceptions and to allow an appeal, and directed the clerk not to file said motion and leave for an appeal and adjourned his court and went away to Florida, where he has remained ever since. No opportunity was left for a mandamus.

This was the final chapter in this most peculiar case, and from this relation of the case it appears that the petitioner has been denied the rights and immunities guaranteed to him by the Constitution of the United States; First, that he was compelled in said so-called trial to furnish evidence against himself. Second, that he is about to be deprived of his life without due process of law. Third, that he was denied a trial by an impartial jury of his county, and was denied a public trial. Fourth, that he was denied the assistance of counsel in the final stages of his case. Fifth, that he was denied the equal protection of the laws. Sixth, and was denied the right of appeal as provided to defendants in criminal cases under the laws of Tennessee.

Petitioner avers that the legality of his restraint has not been adjudged upon a prior proceeding of like character to this.

This is petitioner's first application for the writ of habeas corpus. Petitioner therefore prays that a writ of habeas corpus issue; that he, together with his captor and detainer, may be brought
j before your honor and dealt with as the law shall direct.

N. W. PARDEN,
S. L. HUTCHINS,
Attorneys for petitioner.

Ed Johnson makes oath that the facts stated in the foregoing petition are true in substance and in fact.

ED (his x mark) JOHNSON.

Sworn to and subscribed before me the 7th day of March, 1906.
[SEAL.] W. A. MOORE, D. C.

On presentation of this petition it is ordered that a copy thereof, and of this order, be delivered to or served on the State district attorney-general, the Hon. Matt Whittaker, at once, as notice of this application and the grounds on which it is made, and that he show cause, if he so chooses, against the petition and the writ applied for, on or before 12 o'clock m., Saturday, March 10th, in the United States circuit court room in the custom-house at Knoxville, Tenn., until which time action on the petition is reserved. The petition, and especially the charges as to the conduct of the jury commissioners, may, and if disputed, must be answered.

Done this March 3rd, 1906.

C. D. CLARK, *Judge.*

Hon. M. N. Whittaker, district attorney-general for the sixth circuit of Tennessee, read his answer, as follows:

k *Answer of the State of Tennessee to the petition of Ed Johnson, presented to the honorable C. D. Clark, United States district judge, on March 7th, 1906, praying that a writ of habeas corpus issue for the purpose of inquiring into the legality of his restraint, etc.*

The State of Tennessee, by M. N. Whittaker, district attorney-general of the 6th judicial circuit of the State of Tennessee, for answer to so much and such parts of said petition as it is advised it is material and necessary for it to answer, says:

It is denied that petitioner, Ed Johnson, is about to be deprived of his life without due process of law. It is denied that he was denied a trial by an impartial jury of his county, and was denied a public trial. It is denied that he was denied the assistance of counsel in the final stages of his case. It is denied that he was denied the equal protection of the law. It is denied that he was denied the right of appeal as provided to defendants in criminal cases under

the laws of Tennessee. It is denied that he was compelled in his said trial to furnish evidence against himself.

It is denied that said petitioner has been denied any of the rights and immunities guaranteed to him by the Constitution of the United States.

It is denied that a mob composed of several thousand citizens, or of any other number, made an attack upon the jail of Hamilton County while the said petitioner was confined therein, and it is denied that said alleged mob was only prevented from murdering him by the heroic conduct of the sheriff of the county, the city police, etc.

1 The facts with reference to the so-called mob mentioned in the petition are these: That some men did assemble at the jail in Hamilton County for an unlawful and vicious purpose, and did make an attack upon the jail, but it is denied that any mob of several thousand citizens undertook to take petitioner out of jail. While there were probably several hundred men and boys congregated in the street and yard surrounding the jail, there were comparatively few of the number thus assembled who made any attack upon the jail or showed a disposition to do so. Most of the crowd were evidently attracted to that point by curiosity merely, and not for the purpose of attacking the jail. The alleged mob was quelled and dispersed by some half dozen or dozen deputy sheriffs and police officers. Petitioner, Ed Johnson, was not at this time in the jail of Hamilton County, but was in the jail of Davidson County, Tennessee. There was no renewal of mob violence, and none was therefore prevented by the sheriff on account of the sheriff afterwards privately taking petitioner to the Nashville jail, because as stated, the petitioner had already been carried to the Nashville jail before there was any attempt at alleged mob violence.

It is true that some days before the day appointed for petitioner's trial counsel for petitioner had a meeting with the judge of the Criminal Court, and the district attorney-general, which meeting was attended by the mayor of the city: Dr. J. W. Bachman, a leading minister of the Gospel; Mr. John Early, a prominent lawyer, and Mr. Geo. Chamlee, city attorney, with the view to arrange to prevent any possible trouble, if any should arise, when a trial should be had. It is true that something was said by counsel for petitioner with reference to the matter of a change of venue, or a continuance of the case to the next term, but it is denied that the judge thereupon informed petitioners counsel that he was not going to grant a change of venue, and that he was going to try the case and try it on the day

m fixed. The facts about this matter are these: That counsel for petitioner insisted that they could not get the case ready for trial by Friday, the day it was set, for want of full information concerning the facts of the case. The court thereupon agreed with counsel for petitioner, to defer the case until the following Tuesday, at which time petitioner's counsel said they thought they could be ready for trial, and when on Tuesday the case was called for trial, one of counsel for petitioner, W. G. M. Thomas, announced in open

court that he thought the case ought not to be tried then, and that it ought not to be tried here, but that he understood his honor was of different opinion, whereupon the court said in substance: That there was nothing before the court to act upon; that if counsel for petitioner desired a postponement of his case or a change of venue they must present the question in the usual and proper way, when he would act upon the same; which counsel declined to do, but announced ready for trial, and the case proceeded in usual form.

In this connection respondent desires to state that in this, or some other interview, several having been had, the attorney-general aforesaid stated to counsel for petitioner, in the presence of the court, and had the sheriff also to state, every material fact in the possession of the State, which reflected upon the guilt of the said petitioner, and stated his purpose for doing so was that petitioner's counsel might know what facts the State was going to rely upon for conviction, so that they might have a full and free investigation of the truthfulness of the same, in order that no injustice might be done said petitioner. No fact was kept concealed, but it was the full purpose of the State to make known to petitioner's counsel everything it knew of an incriminating character against said petitioner, so that every fact and circumstance could be fully and thoroughly investigated by counsel for said petitioner.

n The allegation in the petition that these officials, referring to the judge and attorney-general, had caused an inspired article to be printed in the Chattanooga Daily Times assuring the public that the prisoner would surely be tried on the day set for trial, and that there would be no further delay, in order that the fury of the mob might be restrained, etc., is utterly false, without foundation in fact, and made evidently of a desire to misrepresent the judiciary, and made with a malignant purpose and a wicked heart.

It is denied that petitioner's counsel were alarmed by anything either the judge or attorney-general said, in any conference with them in relation to the trial of the said petitioner, or that they were alarmed by any alleged threats of those officials, or either of them, and it is denied that it was solely on account of the fear aroused by such alleged threats, they did not make an application for a change of venue, or for a continuance, or plead in abatement to indictment, or make any other pleas necessary in the premises. It is scarcely to be conceived that lawyers of such standing and ability as the petition alleges them to be would be turned aside from the discharge of their sworn duty by any such alleged threats or conduct as set forth in the petition.

It is denied that defendant did not have a public trial. The facts are, that several hundred people, many of them being mere spectators, or lookers-on, attended throughout the progress of the trial. It is true that a cordon of deputy sheriffs and policemen were placed upon the street corners and the streets nearest the jail, for the protection of said petitioner, in the event public sentiment should be so aroused as that the people might undertake to take the law in their own hands, and everything that was done throughout this trial was done for the protection of the petitioner, and by and through the

advice, counsel, request, consent, and direction of petitioner's counsel.

o It is denied that the father, mother, and all other friends of petitioner was shut out, and that this was done by order of the judge presiding over said court. Neither his father, mother, or other friends asked permission to attend this trial, and consequently no one refused them permission to do so. This allegation in the petition with reference to the father, mother, etc., of the petitioner must have been known by the draftsman of the petitioner to be false, and such statement could only have been incorporated in said petition with the malicious purpose of unjustly prejudicing and injuring the judge who tried said cause.

The charge that during the progress of the trial, when the young lady, Miss Taylor, upon whom the outrage had been committed, was brought back upon the stand, that one of the jurors said, "If I could just get at him I would tear his heart out," is untrue. The facts are these: At the time the case was about finished Juror Wreen requested that Miss Taylor be brought back upon the stand, to which there was no objection from any source. She was brought back, whereupon said juror stated that he desired that the defendant come round and stand in front of her, and thereupon the sheriff requested defendant to come round, which he did, and thereupon the juror requested the defendant to put on his hat, which was done, and all this was done without the slightest objection from the defendant, his counsel, or from any other source whatever, and none of which was directed to be done by the presiding judge. "The court did not compel him to get up from his seat and walk to a position in front of the witness and stand before her, and to put his hat on to be examined and scrutinized by her, before she answered the question propounded to her as to whether or not he was the man who had assaulted her." When the said petitioner came around under the circumstances above stated, Miss Taylor testified that in her judgment before God she believed that he was the man, and

p thereupon Juror Bearden said, with considerable emotion: "Miss Taylor, will you swear that this is the man," and then added, "If I knew he was, I would tear his heart out." Juror Hall, sitting by his side, placed his hands on his shoulder, and this closed the incident, Juror Bearden afterwards apologizing to the court for his emotional conduct.

It is denied that the panel of jurors from which the grand and traverse juries were selected was illegally constituted and that the jury commissioners of Hamilton County had illegally refused to put the names of negroes in the jury box, etc., etc. The facts with reference to this matter are, that in one of the conferences with counsel for petitioner heretofore referred to, in the presence of the trial judge, one of said counsel stated that they desired to raise the question that no negroes' names were in the jury box. Thereupon Attorney-General Whitake stated that that would be a consumption of time for no profit, for the reason that he could take issue on such a plea and prove as a fact that negroes' names were in the jury box, and that negroes had served on the juries drawn from the box since

the same had been filled, and the judge replied, "That's true, and I know it." Whereupon counsel for petitioner said, "That being the case, the question will not be raised."

This identical question was afterwards raised in another case; issue was joined on the plea, and one of the jury commissioners, Dick Henderson, was placed upon the stand and swore that he and other jury commissioners put a considerable number of negroes' names in the jury box. And the deputy clerk of the court also swore that negro jurors had since the time the box was filled served on the jury. It is denied that the putting of the negroes' names in the jury box was by accident, but the same were placed in the box on purpose, and because they were negroes. No person was excluded from said jury box solely because of their race, color, or previous condition of servitude. At no time were counsel for petitioner told by the judge or attorney-general that if they made this question the mob would hang petitioner. The intimation or charge that either the judge or attorney-general held the slightest character of threat over the head of petitioner or his counsel is absolutely false. So anxious were both the judge and the attorney-general for a full, fair, free, and impartial trial to be had in this case that counsel for petitioner were not only notified of all the facts in the possession of the State, but pending the trial, and after all the evidence was in, counsel for petitioner announced to the court that they had just heard of a witness that they were told knew some important facts, and requested the court a half hour or more before the time for adjournment, to adjourn the court, without making them close their evidence, so that they could go and investigate the truth of the rumor, and by consent of the attorney-general, and without the slightest resistance on his part, the judge adjourned the court and allowed time for counsel for petitioner to investigate this rumor.

q

Counsel for petitioner on more than one occasion during the trial of the cause publicly stated to the court that they had been granted every facility to which they were entitled in getting their proof, etc., and that they believed that it was only the desire of the State to have all the facts elicited pertaining to the case.

It is again denied that the jury commissioners of Hamilton County illegally or arbitrarily refused to put the names of negroes in the jury box, and it is denied that if "two or three of their names got in the box it was an accident which was remedied by the commissioners and judges as soon as the fact was discovered." The judge had nothing whatever to do with putting the names of persons in the jury box, or drawing the same out, and the charge or intimation that he had any part in so doing is maliciously false.

It is true that one of counsel for petitioner, after his conviction, said they would make a motion for a new trial, but nothing further was done or said by his said counsel in relation to said motion for new trial, and no causes for new trial were either presented to the court, filed, or offered to be filed by said counsel. About a half hour after the verdict was rendered against petitioner, one of the counsel for petitioner, viz, W. G. M. Thomas, came into the judge's private room and requested the court to appoint additional counsel to

r

confer with him and his other associates as to whether or not there was any error in the record, and whether it would be useless to appeal said case. The court thereupon appointed, at the request of Mr. Thomas, Hon. Foster V. Brown, John H. Cantrell, and Robert Pritchard, and at the special request of Mr. Thomas the judge notified these gentlemen of their appointment, and that Mr. Thomas desired them to meet him and his other associate counsel at 1.30 p. m. at John H. Cantrell's office, which was done, and the board of counsel met there. The details of what transpired in that conference this respondent does not know, but it is a fact, nevertheless, that Mr. Thomas returned after such a conference to the private office of the judge and reported that they had all gone into the case thoroughly, and trial counsel had made their own report of the trial of the case from its inception to its conclusion, and that all agreed, including trial counsel, that there was no error in the case and that the defendant had had a full and fair trial, and that no appeal ought or would be taken, and thereupon told the court they were ready for him to sentence their client to death. And in obedience to this statement, the judge had the petitioner brought from the jail into the court and pronounced sentence, Mr. Thomas appearing in open court at the time, reaffirming in substance the statements heretofore detailed. The court did not on his own motion appoint said advisory committee, or additional counsel, but such appointment was made at the request of counsel for petitioner, and the court made no orders or direction about the matter, but conformed to the request of Mr. Thomas in this respect. When the petitioner appeared at the bar for sentence s the court asked him what he had to say, if anything, why the sentence of death should not be pronounced upon him in accordance with the verdict of the jury. He said, in substance, "Yes, sir; I reckon I have had a fair trial. I am innocent, though; but I reckon somebody has to suffer, and it had as well be me as anyone else." But he did not use the words "I am not guilty," as alleged in the petition. The court did not direct the sheriff to immediately remove the petitioner to Knoxville, because it would be unsafe to retain him here, but the sheriff of his own motion took him to Knoxville, the court being of the opinion that such course was entirely unnecessary.

Under one of the rules of practice in the Criminal Court trying said petitioner it is provided that on conviction of a defendant, if he desires to make a motion for a new trial, his counsel must give notice at once of his purpose to make such motion, and that within three days therefrom—that is, from the date of his conviction—a motion for a new trial must be filed with the clerk specifically setting forth the grounds upon which reliance is had for such new trial. No motion for a new trial was filed in said cause as required by said rule; in fact, no motion of any character was filed or tendered within said three days.

It is denied that either of the present counsel of petitioner or his former counsel, within three days after his conviction, appeared in court and asked leave to file a motion for a new trial, or that the court, arbitrarily or otherwise, refused to allow a bill of exceptions, and to allow an appeal. And it is denied that he directed the clerk

not to file said motion and leave for an appeal, and adjourned his court and went away to Florida. It is true that after the time for filing a motion for new trial under the rule of court aforesaid had expired, N. W. Parden, one of the petitioner's present counsel, appeared in open court and stated that he desired to make a t motion for new trial petitioner. Thereupon Assistant Attorney-General Daniels, who assisted in the prosecution of said case, challenged the right of said N. W. Parden to appear and act for said petitioner, and the said Daniels asked the said Parden whether he had seen or talked with petitioner in relation to his employment or whether he had in fact been employed by him, and thereupon the said Parden stated to the court that he had not seen the petitioner and had had no talk or conference with him on the subject of his employment, and did not know what his wishes were with reference to new trial, but said he had been employed by the father of petitioner, and he thought this was sufficient warrant for him to appear for said petitioner. The said Parden did not present or tender to the court any motion for a new trial, and, as far as the court knew from what the said Parden said, he did not then have any motion for new trial ready to file, no bill of exceptions at that or any other time was ever presented to the court for his approval or signature, and, consequently, he could not have refused to allow or sign a bill of exceptions that had never been presented to him. After the court had heard the statement of the said Parden with reference to his right to appear in said case, he declined to allow him to file any motion for a new trial, giving as his reason, among other things, that no motion for new trial had been made or presented within the time prescribed by rule of the court aforesaid, and that on other occasions he had declined to allow defendants to make or file a motion for new trial after three days mentioned in said rule had expired, and that he saw no good reason why he should pursue a different course in this particular case.

From the language used in the petition with reference to the judge going to Florida it was evidently intended to convey the idea that immediately upon refusing to allow the said Parden to make a motion for a new trial as aforesaid, he thereupon immediately adjourned his court and went to the State of Florida. This is another statement in keeping with the falsity of many other u statements in the petition, and the same being maliciously made, and knowing at the time the same was false. The facts are that the court was not adjourned for several days afterwards and the judge did not leave for Florida for several days after Parden appeared in Court as aforesaid. The only purpose of the said judge in going to Florida was to recuperate his health, which at that time was not good.

And respondent having fully answered prays that petitioner's application for writ of habeas corpus be denied.

STATE OF TENNESSEE,
By M. N. WHITAKER,
Dist Atty. General.

STATE OF TENNESSEE, *Knox County:*

N. M. Whitaker, district attorney general for the Sixth Judicial Circuit of the State of Tennessee, makes oath that the statements contained in the foregoing answer are true to the best of his knowledge, information, and belief.

N. M. WHITAKER.

Subscribed and sworn to March 10th, 1906.

W. L. EDINGTON, *Deputy Clerk.*

v The following oral testimony was introduced, and it was all the evidence introduced on this hearing.

w INDEX.

	Original.	Print.
Foster V. Brown	1	13
W. G. M. Thomas	11	18
J. P. Pemberton	39	33
N. W. Parden	43	35
M. N. Whittaker	50	39
Judge S. D. McReynolds	58	43

1 In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

ED JOHNSON
v.
STATE OF TENNESSEE. } No. —.

FOSTER V. BROWN, the first witness called, being duly sworn, deposed as follows:

Q. Are you a practicing lawyer at Chattanooga?

A. I am.

Q. I will ask you to state if you were invited by anybody to confer with the lawyers of this man Johnson after his trial and conviction at the office of J. H. Cantrell, in Chattanooga?

A. I think it was the same day of the conviction, perhaps about 12 o'clock; Judge McReynolds called me over the phone and said that at the request of one of the lawyers for the defendant Johnson, I think it was Mr. Thomas, he had selected, or some words of that kind, myself and Mr. Pritchard and Mr. Cantrell to confer with the attorneys that had been appointed to defend Johnson, and we were asked to meet at Mr. Cantrell's office about 1 o'clock, and in accordance with that suggestion I went to Mr. Cantrell's office.

2 Q. State whether or not you met the lawyers in pursuance to that request of the judge.

A. Yes, sir; I met Judge Shepherd, Mr. Cameron, Mr. Thomas, Mr. Pritchard, and Mr. Cantrell at Mr. Cantrell's office.

Q. State whether or not you and the other gentlemen composing that conference discussed the question of whether the defendant Johnson ought to prosecute an appeal from the judgment against him.

A. Yes; that was what I understood we were to confer about.

Q. Be kind enough to state what was said by Mr. Pritchard—take him up first—as to the effect upon Johnson if an appeal was prosecuted.

A. I can state about what was said. I think Mr. Pritchard made the statement—do you want me to specify the particulars?

Q. Yes.

A. Mr. Pritchard made the statement, as I recall it, and I will try to state it correctly; I think he had seen some man on the car that morning as he came in, or some time during the day, whom he said was a good citizen, and whom we would say was a good citizen if he would give us his name (but he did not give his name), who said he was opposed to mob violence, but that if Johnson took an appeal that he himself would head a mob to lynch him. That is one statement he made.

Q. State whether or not he said this good citizen said he would head a mob and break the jail that night and lynch Johnson.

A. I do not recall that he said that night.

Q. What did Mr. Pritchard say, if anything, about the action of the police in having protected Johnson up to that time,
3 but that they would withdraw their protection from him if an appeal was prosecuted?

A. Mr. Pritchard made the statement that some one in high authority in police matters (he did not mention the name); he did not say that it was a police commissioner, or who it was. I had my impression about who it was, but it is not necessary to state that impression. He stated that if Johnson took an appeal the police department would not afford the sheriff the protection which the police had theretofore afforded. That was the thing that impressed me, because I live near the jail, and I saw how powerless everything was unless the police was there, and I remember that more than anything else.

Q. State if you did not go to that meeting intending to advise the lawyers of Johnson to take an appeal, and if the statement Mr. Pritchard made, which you have referred to, did not change your views about that subject; in other words, you went there with "blood in your eyes," but that was taken out of you by Mr. Pritchard's statement?

A. I do not know that I can say I went there intending to advise them to take an appeal. I went there to hear what was said. I would be naturally inclined, of course, to yield a client's rights, being a little pugnacious myself, but I did say in the conference, as I recall, to Mr. Thomas that if he believed the man was innocent, or that his guilt had not been made to appear beyond a reasonable doubt, that I would certainly appeal the case. There was a great deal of discussion about it. I had not heard people talk about it very much, and knew very little about the case. Mr. Cantrell was quite insistent that Johnson would be mobbed if an appeal was taken, but Mr. Pritchard and Mr. Cantrell did not give any particular
4 reasons. Mr. Pritchard made the statement that I have referred to, and we were thoroughly impressed that to attempt an appeal meant that Johnson would be mobbed, and the statement

was made that it not only involved the lynching of this man, but of others that were in the jail.

Q. Don't you remember that I made the statement in that conference that I would be willing to go and lay the facts before the prisoner and that if he desired an appeal that I would take it up, and if he desired to submit I would do just as he said?

A. The last thing that was mentioned was this: Mr. Thomas had conferred during the trial with Mr. Spurlock, before the trial came up and also during the trial, about the conduct of the case. Mr. Thomas was very much impressed with the responsibility that rested upon him, as much so as any man I ever saw, and he came frequently to talk not so much to me but with Mr. Spurlock, and I saw in that conference how the matter weighed on Mr. Thomas, and finally Mr. Thomas said this: "Now, gentlemen, you have heard all that has been said, and what do you say to this proposition: That we shall go to the prisoner and tell him just what has been discussed here and just the situation, and tell him that if he attempts an appeal that he is likely to be mobbed, and take his wishes in the matter." That was finally determined upon. I think Mr. Thomas made that suggestion.

Q. I will ask you if Mr. Cantrell did not say in that conference that he had heard since the conviction of this man Johnson at least 25 people in Chattanooga say that if Johnson took an appeal they would lynch him?

A. I do not recall that, Judge.

Q. You saw that mob that night, didn't you?

A. Yes; I live in a block of the jail.

Q. You saw the jail also, didn't you, and the effect of the mob on the jail?

A. Yes.

Q. State whether or not they had battered down the doors of the jail.

A. Yes—that is, I do not know that I can tell you how. There are two doors—the door into the jail and then the door into the residence portion, and I believe that both were battered down.

Q. Did you see the beam of timber with which the doors of the jail were battered down?

A. I do not think I did. I went to the jail immediately after the mob dispersed—that is, before they all got away—but I do not recall seeing the beam. I was close enough to hear the battering, though.

Q. How many persons were in the mob, according to your best impression?

A. I first knew of the mob about 7 o'clock. I should say, just giving a guess, there must have been from 1,000 to 1,500 people in it.

Q. Did you hear the exclamations of the mob as to who they were after?

A. I did not, and was not close enough to hear that.

Q. Did you attend any part of the trial of Johnson after the trial was taken up?

A. I was only in the court room just two times, and was then only in there a minute or two and came right out.

Q. Was there a picket stationed around the court-house to keep the public from going into the court-house?

A. Yes.

6 Q. There was a picket around all sides of the court-house, wasn't there?

A. Yes. I do not know who they were to exclude, but I know that policemen were stationed there and you had to get permission to go in the court-house. I had no trouble myself in getting in.

Cross-examination:

Q. I believe you stated that in the conference you had with Judge Shepherd W. G. M. Thomas and Mr. Cantrell were there.

A. Yes.

Q. They were the three lawyers who had defended the prisoner, were they not?

A. Yes.

Q. I will ask you to state if it is not a fact that each one of these gentlemen was asked the question whether or not, in their opinion, if an appeal was taken it would accomplish anything; in other words, whether there was any error in the record?

A. Yes; that was gone over. I myself asked the question—of course I knew about the case from reading the papers, but of course was not familiar with the trial, and one thing I wanted to know was whether any error had been committed, and that was discussed, and it was agreed that so far as we knew, from what the attorneys said, that no error had been committed in the trial.

Q. I will ask you to state if it is not a fact that after you had asked these three lawyers who defended the prisoner this question, if you did not come to the conclusion that there was no error in the record that would avail the prisoner anything in the event an appeal was taken?

7 A. I say that I asked them if any error had been committed, and we came to the conclusion that there had not, and I think that I said that on the facts as we understood them I believed the Supreme Court would affirm the judgment.

Q. Didn't Judge Shepherd state in that conference that he did not think there was any error in the record?

A. I think so.

Q. Didn't Mr. Thomas make the same statement?

A. I do not know that Mr. Thomas did.

Q. What about Mr. Cameron?

A. I do not remember that he said anything during the conference at all. I think Mr. Thomas made the statement that he was not as familiar with the criminal law as other lawyers, and I do not believe that he expressed any opinion on it.

Q. You had had a large experience in the criminal law, and had been attorney-general for eight years had you not?

A. I had experience while I was attorney-general.

Q. Have you had more or less to do with the criminal practice since?

A. Somewhat; not very much.

Q. Judge Shepherd is regarded as one of the leading criminal lawyers in Chattanooga, isn't he?

A. Unquestionably.

(Judge SHEPHERD. The best lawyer of any other kind, too).

Q. Hence it was that after everything was talked over concerning the case; what had been done by the judge, the jury, and everybody connected with the trial, you all came to the conclusion that it would affect no good purpose if an appeal was taken?

8 A. Yes; but I will qualify that. I said I did not believe it would avail anything if appealed, but I would not say I would not have taken an appeal but for the peculiar situation of the public mind at that time.

Q. And it was agreed there by the six men that no appeal ought or would be taken?

A. No; it was agreed to state the facts to the prisoner and leave the matter to him.

Q. You speak about the jail having been broken into. You have reference alone to the outer doors and wooden doors, do you not?

A. Yes, entirely so. I did not go inside the jail.

Q. You do not know that anything was broken on the inside at all, do you?

A. I do not.

Q. You speak about the size of the crowd there at different times amounting probably, you say, to 1,000 at times. You do not know how many were there for the purpose of mob violence, and how many were there out of mere curiosity, do you?

A. I assume, of course, that most of them were there as mere spectators. There was a large crowd inside of the jail yard and surging to the doors; some two or three hundred it seemed to me.

Q. H. Clay Evans was there in the crowd, wasn't he, and a number of other prominent gentlemen?

A. I saw Mr. Evans after the mob had gone, and knew from what he said that he was there trying to quiet the mob.

Q. You speak about policemen being stationed around the court-house; they were down on the street corners and along the street, were they not?

9 A. They were all around the four sides of the court-house on the walkway.

Q. State if it is not a fact that after the first day of the trial that the Circuit Court held downstairs and people came and went as they desired.

A. I think that is true. I believe I recall that. The first day the police were all around the court-house and there were very few people in the court room, and that night there was no one around the jail, for I went down to see if the police were there, and no one was there, and everything seemed to be quiet, and the next day, while the police were around the court-house, people did go into the court room below.

Q. You were in and out of the court-house where Johnson was being tried every day, wasn't you?

A. I think I was there once on the first day and once on the second day, but only for a few minutes.

Q. Isn't it a fact that quite a number of people outside of the lawyers were sitting around looking on at that trial?

A. There were not a great many the first day; just how many I do not know. There was some considerable people the second day.

Reexamination:

Q. The Circuit Court downstairs did not hold the first day of the Johnson trial, did it? It adjourned in consequence of that trial, didn't it?

A. Yes.

Q. On the second day of the Johnson trial the Circuit Court did convene downstairs?

10 A. Yes.

Q. And the police that kept people out of the court room were stationed at the head of the steps, were they not?

A. I think they were there both days. I know there were not so many restrictions the second day as on the first day, and that demonstrated that the people had quieted down.

Recross-examination:

Q. State whether or not, after the conference you six lawyers had with reference to this matter, you had a talk with Judge Shepherd, in which he stated he had no knowledge of the appointment of this advisory committee.

A. On that same day?

Q. At any time after that?

A. I do not think that has got anything to do with it, Mr. Daniels.

11 W. G. M. Thomas, the next witness called, being duly sworn, deposed as follows:

Q. I want you to state to the court the interview that occurred in the first meeting between the counsel for Johnson, Judge McReynolds, and others, in Judge McReynolds' room at the court-house in Chattanooga. You know what you want to state, and just tell it to the court without my asking you.

A. I had heard that I had been appointed in connection with Judge Shepherd and Mr. Cameron by Judge McReynolds to assist in the defense of Johnson. I went to Judge McReynolds and asked him if that was true, that I had been appointed by him, and he told me that it was, and the reason I went to him was that I was not a criminal lawyer and never had been, and I thought at first that there was a mistake about it. Judge McReynolds told me that the duty must fall upon some lawyer, and it had fallen upon me, in connection with the others. I wished, and my associates wished, to have a meeting on the subject of a possible trial. That meeting was held a few days before the trial in Judge McReynolds' chambers in the court-house. There were present, as I remember, my associates, Judge Shepherd and Mr. Cameron, Mr. Whittaker, the attorney-general, Mr. Daniels, assistant attorney-general, as I recall, and the mayor of the city, Mr. Frierson, and Dr. Bachman, a minister of Chattanooga, and Sheriff Shipp, and a lawyer by the name of Early. Those were the gentlemen present. In a general way what occurred

down there, as far as I was concerned, was an effort to have the trial postponed or continued, or a change of venue to some other county.

Q. What was said about procuring a change of venue, and what steps were taken for that purpose?

12 A. What was said by the different ones I can not recall, but the purport of it was that owing to the very excited condition and unrest in Chattanooga, and the fact that a few days before there had been mob violence at the jail against Johnson and two other negroes, one of whom had been arrested on suspicion of breaking into the Orphans' Home and assailing a little orphan girl, and the other being a negro arrested for killing a constable of the county, that we felt certain that Chattanooga was not the place and that was not the time for the trial; that a man in any case of that kind could not get a fair trial with that condition prevailing in our city.

Q. What did Judge McReynolds say about granting a change of venue or a continuance?

A. It was the judgment of the attorney-general and Judge McReynolds that the case ought not be postponed; that it would get worse instead of better.

Q. State whether or not an agreement was reached by which the trial of the case was postponed for a few days.

A. Yes. Owing to the violent spirit of the people, as we all agreed and conceded it to be, plans on both sides were by arrangement kept from the papers and the people, and a day was finally set, and then it was changed until the Tuesday following.

Q. I will ask you if an article was not written for publication in the Chattanooga Times and exhibited to both the judge and the attorney-general, with a view to allay the excitement of the people against Johnson?

A. I do not think that I showed the article to Judge McReynolds and Mr. Whittaker. I may have done so, but I do not remember

13 that I did, but I did state in one of the interviews that we had that I was willing to do anything that I could; that I was willing to take the blame upon myself, if necessary, if anything I could do would give a more restful feeling in our city, and I did draft a paper and give it to the Times.

Q. Didn't they suggest that a delay of the case was liable to result in a lynching of the negro?

A. Yes, I understood that was their judgment; that the longer the trial was delayed the worse affairs would get.

Q. You wrote an article and said that you were going to tell the judge and attorney-general about it, didn't you?

A. Yes, but I cannot recall whether I did see Judge McReynolds and Mr. Whittaker or not, but I did send the article to the paper.

Q. After that you went on a journey to Nashville to see the prisoner, didn't you; you and I together?

A. Yes, when we learned that there would be no postponement and no change of venue to any other county, and that we had to try, you and I felt that we ought to see this prisoner, and we went to Nashville.

Q. State whether in the interview we had with Judge McReynolds and the attorney-general after our return from Nashville, or the one we had before going to Nashville, whether it was agreed by the gentlemen present at that interview that it would be dangerous to the life of Johnson if we made an application for a change of venue.

A. Yes, that was the judgment it; that if we made any dilatory move it would inflame the spirit of the people.

Q. State whether or not you mentioned at one of those meetings that you felt it to be your duty to make an application
14 for a change of venue, or for a continuance of the case, on account of this feeling.

A. We did not make this move because we were afraid there would be a lynching if we did.

Q. You stated in the meeting that you thought that was your duty as a lawyer, to properly represent Johnson, and you did not do it because of the feeling of the people?

A. Yes; if the case had been an ordinary one I would have recommended this step, either a postponement or a change of venue; but the conditions were such that in my judgment it was unsafe.

Q. You urged a change of venue to either Nashville or Knoxville, did you not?

A. Yes; if he was to be tried at that time. In other words, I believed—and my associates, as I understood them, agreed—that if we made a public application in court for an extension of time, or a public application for a change of venue, that the people, hearing of this move, would uprise and we could not avoid a mob. That was my judgment.

Q. Why was it that you did not file a plea in abatement attacking the indictment against the defendant on account of the fact of the formation of the jury under our jury commission law in Chattanooga?

A. I learned from you that in the Westfield case, being the case where Westfield had killed a constable in our county, you represented him and in that case filed a plea with respect to the matter suggested, and that the attorney-general in that case had perhaps made a motion to strike and that motion had been acted on
15 by the judge, and you, in one of the interviews with the attorney-general, and I think in the presence of all the gentlemen named at the interview, said that you desired to do that in the Johnson case and asked the attorney-general if he would allow the same course to be taken as in the Westfield case, and Mr. Whittaker said no, that he had made an investigation of the facts since the Westfield case and that he could prove that there were names of colored men in the jury box, and that if you filed such a plea the State would join issue on it. After we left the interview, those facts being presented to me in that way, we, representing Johnson, were as much afraid of making a move of that kind as a move to get further time, or a change of venue to another county, or to continue until the next term. It was a technical move, and I was afraid, and my associates were afraid, that if we took a position of that kind it would mean what we were trying to avoid, another uprising.

Judge CLARE. Did you ever look into the matter to see how the facts were about that?

A. No, sir; I just took it for granted that the attorney-general would take that action and join issue on the plea, and that would mean a trial and make prominent a question of that kind, and I feared the result on account of the unrest.

Q. On your return from Nashville do you remember that we had a second interview with the judge and the attorney-general, say on Monday, the day before the Johnson case was tried?

A. Yes; I do not remember the day, but I remember that we had a meeting.

Q. What efforts were made by you and me to get a postponement, or the protection of Johnson at the trial, if we could not get a postponement?

16 A. As I understand it, all were uneasy—the sheriff's department, the attorney-general and the judge, and I know we were—about the possibilities which might result from bringing Johnson from Nashville to Chattanooga at that time.

Q. What did Mr. Whittaker say about having had an interview on Sunday night with Gov. Cox?

A. He reported to us that troops would not be furnished; that the governor said the case ought not be tried, or if tried it ought to be tried in Nashville.

Q. Didn't he state that the governor declined to furnish troops?

A. Yes; for that reason.

Q. State whether or not Mr. Whittaker said he would not make any further application to the governor for troops.

A. Yes; Judge McReynolds and Mr. Whittaker both said they had done all they could to get troops, and they did not know anything more they could do.

Q. I wish you would describe to the court the incident in the trial of the case where the defendant came around, or was directed by the sheriff, in the presence of the court, to come around and stand before this young lady, and what he done, and so on?

A. It was a very dramatic occurrence—the most, I think, I ever saw in my life. Mr. Wrenn, one of the jurors, toward the close of the trial said that he wanted the young lady recalled to the witness stand. She came, and then he said he wanted the prisoner to stand up and come around in front of Miss Taylor, and that was done, and he said he wanted the prisoner to put his hat on, and that was done; and then

he asked Miss Taylor a question, in almost these words: "Miss
17 Taylor, I want to know if this is the man that assaulted you," and Miss Taylor, under very great excitement or nervous tension, started to make a reply, and Mr. Bearden, a juror, threw up his hands and said something like this—I won't undertake to quote his exact language: "For God's sake, Miss Taylor, make no mistake; for God's sake, be careful." And then the young lady held her hand up and said something like this: "In the presence of my God, I would not have an innocent man to suffer, but I believe he is the man." And before she finished that sentence, as I now recall it—I think that is the order in which the events took place—Mr. Bearden said: "If I

knew he was the man, I would tear his heart out," or some expression like that.

Q. Did anybody restrain Mr. Bearden? Did Mr. Bearden make any motion towards the defendant, and was he restrained?

A. He made some movement. I do not know whether it was a movement of excitement, but it seemed so. He was under very considerable nervous tension, I thought, throughout the whole trial, and the other jurors were also. I saw Mr. Hall, who sat next to Mr. Bearden, put his hand on his shoulder and say something to him. What he said I do not know.

Q. After the trial there was a conference held with the lawyers for Johnson and certain other gentlemen appointed by the judge, and I want you to tell the judge how these advisory gentlemen came to be appointed and what occurred at that meeting.

A. The jury returned a verdict that morning, after being out over night, of guilty against this defendant, with a sentence to be hanged. We then, for the defense, met that situation—a death sentence against this man—and the question as to what we ought to do, and, as Mr. Brown said on the stand a few minutes ago, I did feel throughout the whole trial the very keen responsibility on me under
18 Judge McReynold's appointment—perhaps more so because it was the first time in my professional life when a human life was in my hands as a lawyer—and I felt like I ought not, and almost like I could not, carry the responsibility alone with Judge Shepherd and Mr. Cameron any further, and I was altogether responsible for the appointment of Mr. Brown, Mr. Pritchard, and Mr. Cantrell. I advised with several of my friends of the bar, and they made that suggestion to me—that we ought to ask for some sharing of the responsibility, now that the jury had convicted Johnson. I went to the chambers of Judge McReynolds and made known my position and my request, and he said that he had no objection to taking that course, and that he would make the appointment. The only suggestion that I made, as I now recall, was any three good lawyers in Chattanooga, and we met, as Mr. Brown said, at Mr. Cantrell's office about 1.30 that afternoon. I went to Judge McReynolds and asked him to do this.

Q. Now state what occurred at that conference.

A. We six lawyers did more or less talking, as I remember, and one of the questions was whether there was any error in the record under the judge's charge, or in his ruling upon the evidence, and not being a criminal lawyer myself I did not feel that I was capable of advising upon this subject and felt like giving way to the other lawyers present. But I did ask this question. We had that meeting for the purpose of determining whether or not the case ought to be appealed to the Supreme Court, and the only doubt on that subject was whether the appeal and the consequent delay would mean that Johnson would be mobbed instead of hung by the law, so I asked these lawyers, after we had canvassed the situation, to answer one question. I told them that if they would answer one question
19 that I would be able to settle what I believed to be my duty in the premises, and that question was this: "Whether an appeal of the case would mean a mobbing of the defendant."

Q. Before we get to that I will ask you to state about whether there was error in the record was confined to the judge's charge and his ruling on the evidence?

A. It arose in this way: I wanted to know and the different ones wanted to know whether anything could be accomplished by appealing. In other words, whether there was reversible error in the record and that by taking the case to the Supreme Court whether or not anything could be accomplished by it, or was it merely a question of continuing a human life; and the lawyers present gave their opinion, first, that lawyers representing a defendant in a criminal case did not owe him the duty of merely continuing his life, and if an appeal would mean merely a continuance of a human life, without more, that that was not the duty of a lawyer representing a criminal, and, second, that there was no reversible error as discovered in such a way as to grant a new trial, and, in the third place, that an appeal would mean a lynching. That was the judgment of that meeting.

Q. Tell us what was said by the advisory committee and the other lawyers with respect to whether or not a lynching would occur if we took an appeal.

A. Yes; each lawyer present stated the evidence before him up to that date, and those evidences were all put together. I think I was the one who asked the question, and each one answered the question the same way—that they believed that if we prosecuted an appeal that the jail would be raided and we would have another uprising in the city—and when that answer was given me I stated that my mind was at rest as to what I should do; that we ought not to take an appeal.

20 Q. State whether or not the gentlemen present gave evidences of what they had heard said.

A. Yes.

Q. What did Mr. Pritchard say?

A. About as Mr. Brown stated.

Q. And Mr. Cantrell?

A. Mr. Cantrell stated it in this way, as I remember, that he had heard at least 25 men that morning say that an appeal would mean the lynching of this defendant.

Q. Had you had an interview with a prominent citizen, and did you state that at the meeting?

A. Yes, I think I stated that I had heard it from some one that an appeal would not be submitted to by the people.

Q. Was it some gentleman that was a business man and that owned his own house?

A. Yes.

Q. Was anything said about them going to lynch the lawyers for the defendant if they persisted in an appeal?

A. I believe that was stated by some one, but I do not remember who. I am not sure. I do not know but what some one said a dilatory movement would wind up in lynching the judge and everyone else. I did not place any credence in that.

Judge CLARK. So that the whole of it was that two things actuated you. One was that you did not believe that there was any available

error in the record that would help the defendant, and the other was that you thought it would cause an uprising?

A. Yes, as Mr. Brown said, not being a criminal lawyer myself I had to rely, or felt like relying largely on what the other gentlemen would say as to whether there were errors, but on the
21 subject of what the result of an appeal would be I acted upon the evidence before me.

Q. What was the final outcome of that conference? What was decided upon, and what was done?

A. Three lawyers said that they thought that you, Mr. Cameron, and I should go to the jail and visit this defendant, tell him all the facts, and abide by what he would say, and we took that course. You, Mr. Cameron, and I went to the jail and saw Johnson and undertook to give him the real facts, and I, among other things, stated to him that he was originally suspicioned as the guilty man; that a great many people believed him to be guilty simply because of his arrest, as evidenced by the mob of a few nights before, and that now 12 men upon their oaths had found him guilty and that that would strengthen and had strengthened the judgment of the public, and that these six lawyers, after canvassing the whole situation, had reached the conclusion that his life could not be saved; that he would die either by a mob or by the law, and we wanted to be candid and tell him the facts, and he told us that he was not guilty; that it looked like the jury had put it on him; that he did not want to be mobbed. I believe we did tell him, too, that if a mob broke into the jail we did not know how far they might go with reference to lynching others in the jail, and he said he did not want to be mobbed himself and did not want anybody else to die who was not connected with it, and that he would go over and tell the judge that he would take whatever they put on him, or something to that effect, so you and I then, and I think Mr. Cameron also, walked over to the court-house, and in a minute or two Johnson was brought in and sentenced, although I did make a statement to the court before he was sentenced——

Q. When Judge McReynolds asked him what he had to say,
22 he remarked that he did not have anything to say, and you made a statement to the court, and in that statement you referred to what had been advised by this committee and what you had told the prisoner, and then told the judge that as he had appointed us to defend Johnson and the jury had passed upon the case, if he now approved the verdict the case was up to him?

A. Yes; among other things I reviewed what had taken place in the interview between the six lawyers, and our interview with the prisoner, as I remember it, and stated to Judge McReynolds that he had appointed us and that we had tried to do our duty; the jury had rendered this verdict and that if he approved that verdict—if that verdict was satisfactory to him under the circumstances—we felt that we would have to acquiesce. That was the substance of what I said.

Q. State whether or not you or myself or Mr. Cameron appeared any more for the prisoner Johnson after that.

A. No.

Q. We had nothing to do with rendering him assistance as his counsel after that, did we?

A. I have not, and so far as I know you and Mr. Cameron have not. That was my last connection with the case.

Q. You have been a practicing lawyer at Chattanooga since 1899, haven't you—since the passage of our jury commission act?

A. Yes.

Q. You have practiced in the Circuit Court and occasionally in the criminal court?

A. I do not think that I have been in the criminal court except in this Johnson case in five years. I practice in the Circuit Court.

23 Q. I know you had one case where you were trying to convict some railroad laborers of mine.

A. Yes; I believe that has been within five years.

Q. Have you ever seen a colored man there on the jury since that time?

A. Not since the jury law; no.

Judge CLARK. When was that law passed?

A. In 1899.

Q. Did you get some anonymous letters after the trial of this case warning you to cease your connection with the defense of Johnson?

A. I got anonymous letters on all subjects growing out of the Johnson case; some censuring me for accepting the appointment of Judge McReynolds, some commending me for it, some censuring me for not appealing the case, some commending me, and all shades of letters.

Q. Was there any threatening letters?

A. No; there were no threats. They called me various and sundry things.

Judge CLARK. So you met the usual fortune of men; you have been praised and abused by all.

A. Yes; they took all sides, Judge.

Cross-examination:

Q. I understand that your first connection with this case was when you met in conference with Judge McReynolds, Attorney-General Whittaker, Dr. Bachman, and others in the private offices of Judge McReynolds. Is that true?

A. No; I had been appointed before that.

Q. But you had taken no steps until you went and had

24 this conference with these gentlemen?

A. Yes, as soon as I learned of my appointment; I learned of my appointment by one of the lawyers at Chattanooga telling me of it on my way home one evening, and the next morning I went to see Judge McReynolds and asked him if it was true. I also saw it published in the paper, and when I learned that it was true I did not know just what to do, but I commenced informing myself.

Q. The purpose of that interview was to talk the situation over and to determine what was best to do under the circumstances?

A. Yes.

Q. You did not understand that Judge McReynolds was there talking for the court, did you?

A. No; the gentlemen named by me were there.

Q. You were there to discuss the conditions as they existed and what was best to be done?

A. Yes.

Q. I believe you said that some time during that conversation you stated you thought the trial ought not be had at that time, or that there ought to be a change of venue?

A. Yes; I was very strongly and earnestly in favor of Knoxville.

Q. And I believe you stated it was the judgment of the other gentlemen present that a continuance should not be asked for and that there should be no change of venue asked for?

A. Yes; we thought that in a capital case we ought to have more time that that would give us, and we thought that Chattanooga was not the place and that was not the time for a trial.

Q. It was first understood that the case would be called for trial on Friday, wasn't it?

25 A. Yes.

Q. Upon your statement that you felt the time was too short, isn't it a fact that both the judge and attorney-general willingly consented that the case might go over until next Tuesday, so as to give you ample time?

A. As I remember it, there were two things that moved for that to be done. I understood that the city was not in a position to protect the man and that the peace officers were trying to get troops, and then we were asking for more time, and the two together resulted in a changed date, as I understand it, hoping in the meantime—but to go back. We were anxious for two things: First, to not have a trial if possible, and next, if a trial, to be assured that this man would be protected, as we were afraid he would not be.

Q. Isn't it a fact that the attorney-general and the sheriff gave you all the facts that the State had in its possession in relation to the guilt of this man?

A. Yes; I must commend the attorney-general and the sheriff for that. I stated to them in this interview that we three lawyers had been appointed by the judge in a disagreeable task, and that I thought the State ought to let us know what we had to meet, because we were not trying to acquit a guilty man, and that we were wanting the light and wanting the truth if we could get it, and Mr. Whittaker and the sheriff told us very freely the proof that they had and the names of the witnesses, and we told them what we had.

Q. Isn't it a fact that Judge McReynolds requested the sheriff to give you all the information he had?

A. I do not know about that, but I know that Sheriff Shipp did.

26 Q. Isn't it a fact that you had all the testimony that was introduced against the defendant—that is, all the substantial testimony—you had knowledge of it several days before the trial?

A. We knew in advance substantially what the State's witnesses proved on the trial, with the exception of one man, and he was called in at the last, and I have every reason to believe that the State did not know of his existence until at that time.

Q. He was not called in until after the State had closed, was he?

A. Yes.

Q. You say you stated there what you felt ought to be done. This petition charges that after those statements had been made that the judge thereupon informed petitioner's counsel that he was not going to grant a change of venue, and that he was going to try the case and try it on the day fixed. State whether or not he used that language.

A. No; it was this way: We for this defendant went just as far as we could possibly go without making public application for a change of venue, and we went just as far as we could to persuade the attorney-general and the judge to either pass the case or continue it, or to give us a change of venue, and we did not make the public application and it did not occur in that way. In these interviews we were just stating our position and stating our case, and trying to get one or the other of three things done, and it was the judgment of Judge McReynolds and the attorney-general that we were wrong; that any further delay would make the situation worse. We believed that it would make it better. That was the difference.

Q. You felt free to make, as far as the judge and attorney-general were concerned—you felt free to pursue any course
27 you saw proper?

A. Yes; in these private interviews I did, and I made my position and requests known then; but I was afraid, and Judge Shepherd and Mr. Cameron were afraid, to make these applications public, because of possible mob violence.

Q. It was not, then, because of any threat or intimidation made by the judge and attorney-general, or either of them?

A. No; it was because of the public. We feared violence from the public if they reached the conclusion that the lawyers for this man were trying to gain time.

Q. And neither the judge or attorney-general said to you in any interview that you should not or must not make any application?

A. No; they used persuasion. Maybe I ought not say persuasion. They used argument; that now was the time instead of a later time, and that these things would bring about a great unrest, in their opinion. In other words, they differed from us on these propositions.

Q. When the day was finally reached for trial, I will ask you to state if you did not get up when the case was called and say to the court that you had felt, or then felt, that the case ought not be tried at Chattanooga, or that there ought to be a change of venue granted; that you understood that the court had a different view about it, and the court then said to you that there was nothing before the court for the court to act upon; that if you desired to present any of those matters you could do so and he would then act upon it?

A. Yes; in substance that. I might premise my answer just there by saying that in my judgment lawyers for a defendant could
28 not possibly be in a worse situation than we were. We did not want a lynching; we did not want the jail attacked. We wanted to do our duty by this defendant, and we felt that we were tried in one way and another. If we did one thing another thing would result, and we did not see how those things could be prevented

if we had done what we would ordinarily have done in that kind of a case, so I was afraid when the case was called that morning to make a public application for a continuance, or for a change of venue, and I felt that as far as I could safely go would be to tell Judge McReynolds my position and our feelings in behalf of the defendant, and to remind him of what we had tried to do in these private interviews.

Q. And you presented no motion whatever to continue the case or for a change of venue?

A. No; for the reason just stated.

Q. And filed no plea raising the question as to the illegality of the grand or petit jury?

A. No.

Q. With reference to that plea in abatement, I will ask you to state if it is not a fact that you were led mainly not to file that plea because it was stated in the interview that if that plea was interposed issue would be joined on it, and that the proof would show that negroes had been put in the box and had served on juries?

A. Yes; in part. If we had agreed—that is, the three of us for this defendant—had agreed to see the attorney-general and get him, if he would, and we supposed he would at that time, to make the same agreement with us that he did in the Westfield case; that these matters could be made formally matters of record, but Mr. Whittaker said that he had investigated the facts and had

29 found if the plea if filed would not be good, or rather true, and that he would join issue on it, and then that would mean a public trial of that question, and we were afraid of that just as we were afraid of the result if we had taken those other steps.

Q. You say that Judge Shepherd's desire was that a formal plea should be put in, and that nothing further should be done except to move to strike it out, but that the attorney-general said he would not allow it to take that course, because he could take issue on it and prove that negroes' names were in the jury box, and after that you all concluded you would not put in the plea?

A. Yes; Judge Shepherd asked the attorney-general if he would allow the same course to be taken as in the Westfield case, and Mr. Whittaker said no; that he had learned that there were names of colored men in the jury box and that he would join issue on the plea if filed in the Johnson case.

Q. State whether it was because of any threats made by either the judge or the attorney-general that induced you not to put in the plea in abatement?

A. No; no threats were made by either of them.

Q. This petition speaks of these officers, referring to the judge and attorney-general, causing an inspired article to be published in the Chattanooga Times. State whether anything of that kind ever occurred.

A. No.

Q. So the alleged interview was written by you?

A. I wrote one. I do not know what that has reference to.

Q. As far as you know, neither the judge or the attorney-general had anything to do with any communication in the Chatta-
30 nooga Times or any other paper, did they?

A. Nothing except the announcement in the paper that no persons would be allowed at the trial. That is the only one I knew of Judge McReynolds having anything to do with.

Q. Wasn't it the desire of the petitioner's counsel that that announcement should be made?

A. Yes; we all wanted an orderly trial as far as possible, and that was in the direction of an orderly trial.

Q. You speak of police and deputy sheriffs being thrown around the jail. Wasn't that all talked over and didn't you agree to that and desire that to be done?

A. Yes; we wanted this man protected, and wanted to know, as far as we could, whether he would be protected.

Q. Isn't it true that you also requested that the militia be called out, if possible, to be thrown around the jail, or used in the protection of this prisoner?

A. Yes; I wanted the body of the county called, if necessary; anything to protect this man. I did not want him lynched.

Q. So whatever was done with reference to placing guards around the court-house was done with your knowledge, and it was your desire that it be done, for the protection of the prisoner?

A. I do not know what the arrangements were. The sheriff assured me that he would do everything he could to protect the prisoner, and I commended Judge McReynolds when I heard he was going to keep a mob out of the court-house, and I think yet that it was the proper thing to do.

Q. It is further charged in this petition that the judge, of his own motion, appointed these three gentlemen to confer with counsel for the prisoner in relation to your duty in the premises, and the committee is referred to as the "judge's advisory committee."
31 Isn't it a fact that you alone are responsible for the appointment of that committee?

A. Yes, that is a fact; I alone am responsible for that. I went to Judge McReynolds and made the earnest request of him that he appoint some good lawyers that I could lean on with reference to whether we ought to appeal.

Q. And this committee was appointed at your request and to your satisfaction?

A. Yes.

Q. You did not understand that this committee was appointed for the purpose of intimidating you, or causing you not to perform such duties as you thought proper toward the prisoner, did you?

A. No; I asked Judge McReynolds to appoint three lawyers that would meet with us and canvass the situation and reach a conclusion as to whether the case ought to be appealed or not, in view of the unrest in our city and the possible result.

Q. Isn't it a fact that Judge McReynolds had some hesitancy in appointing the committee and asked you fully as to your objects in making the request?

A. I do not know whether he asked me any questions or not. I think he said, "Well, you gentlemen have performed your duty to this defendant." There was no censure from him, and he seemed to have no objection to making the appointment, and said he would do so. In other words, I did not have any trouble in having him comply with my request.

Q. And it was at your request that he asked you all to meet at Mr. Cantrell's office?

A. Yes.

32 Q. When you met there you went over the case thoroughly, didn't you?

A. Yes; as thoroughly as we could, I think. We were in session about one hour and one-half.

Q. You told this committee the condition of the record as you understood it, did you not?

A. Yes; we talked about the trial.

Q. And it was agreed that you knew of no error in the record?

A. Yes.

Q. And after talking the whole matter over the entire six of you agreed that if the case should be appealed that in your judgment it would simply mean to prolong the life of the prisoner?

A. No; it was the judgment of the six lawyers that it would mean a lynching if we appealed.

Q. Suppose there was no lynching at all; wasn't it the judgment of all of you that even if he were not lynched that there was no error in the record?

A. Yes; taking out the mob violence, I think I stated that while I did not pretend to be a criminal lawyer, I could not put my finger on anything that I could say was error in that trial. I think I stated that.

Q. After your conference you went immediately, did you not, to the private rooms of Judge McReynolds at the court-house?

A. I notice that stated in your answer, but I can not remember about that. I have been trying to think and can not remember seeing anyone.

Q. Let me refresh your recollection. Isn't it a fact that after

33 your conference, and before you went to the jail, you went to Judge McReynolds' office and had a talk with him and told him you were going from there to the jail, and didn't Mr. Pritchard come in while you were there, and you asked him to wait until you came back?

A. Since you have refreshed my recollection, I believe I did see Judge McReynolds after that conference with the lawyers before I went to the jail. Before that my impression was that Judge Shepherd, Mr. Cameron, and I went straight to the jail, but I think they went to the jail and I left them on the street in front of the jail, and I believe I did go to Judge McReynolds' office.

Q. You told him what you had concluded to do, and that in your judgment that if an appeal was taken and the Supreme Court called to act upon the case there would be found no error, didn't you?

A. I can not remember what I said to Judge McReynolds. I remember that I did see him and went from his office to the jail to see

this defendant, but I can not now recall anything that took place between Judge McReynolds and myself. I must have told him the result of that conference.

Q. Isn't it a fact that after you had the conference in the jail with the prisoner that you then told him you had no further motion to make and that you were ready for him to sentence the prisoner?

A. I do not think I saw Judge McReynolds after we saw the prisoner. I think I told him that we were going over to see the prisoner, but I will not be positive about what occurred, because that has practically passed from my recollection.

Q. Isn't it true that after the prisoner was brought over and was in open court that you then stated to the court that you had no
34 further motion to make, and no motion for a new trial would be made, and that he could proceed to sentence the prisoner?

A. I made a statement to the judge in open court of the meeting of the six lawyers and of the result of that meeting, and said that if his honor was satisfied with that verdict, or acquies'ed in it, that he could sentence the prisoner. That was the statement I made, as I now remember it.

Q. And you made no motion for a new trial?

A. No.

Q. And declined to make it, didn't you?

A. Well, we did not make it.

Q. And your connection with the case ended at that time?

A. Yes.

Judge CLARK. What was the date of that?

Mr. DANIELS. The same day of the conviction.

Judge CLARK. And the record shows that date to have been when?

Mr. DANIELS. Feb. 11th, 1906. The jury returned a verdict about 9.30 that morning, and the prisoner was brought before Judge McReynolds about 3 o'clock that afternoon.

Judge CLARK. I wanted to see about what time had intervened.

Q. You say your connection with the case ended at that time?

A. Yes. As I said before, I had no connection with the case at all after that date whatever.

Q. State if Judge McReynolds said anything to you about anyone criticising his conduct in his speech, and what you said upon that subject.

Judge SHEPHERD. I object to that question.

35 Mr. WHITTAKER. Judge, I am more familiar with that, possibly, than Mr. Daniels, and I will ask the witness a question. I will ask you if at the time you returned from the meeting with these six lawyers if you did not come to Judge McReynolds' room and didn't he make some statement to you about Judge Shepherd's criticism of his conduct of the case in his argument before the jury, and that if you did not reply, "Judge, you heard no such criticism from me, I know, because I think and have said that this defendant has had a fair trial throughout this case?"

A. I do not remember it that way. I think Judge McReynolds did say that he thought Judge Shepherd had been severe somewhat in his argument of the case before the jury, and as I remember it I

said, "Well, Judge, do you feel that way about anything that I said in my argument?" and he said, "No, I do not." I told him I certainly did not intend anything like that, but if anything was said on the subject of the trial it must have been along this line, as I now recall it. That we had a quiet, orderly trial, the man was protected from outside violence, and I may have said that so far as I knew I could not put my finger upon any error; but I will not be sure about that. It may have occurred just like you have stated it.

Q. Your recollection about that is not very clear, is it?

A. No; and I do not deny but what it may have occurred somewhat as you have stated, but I can not remember it.

Q. Isn't it a fact that you have on more than one occasions during the trial said that the court had given you every facility possible to help you along with the case?

A. Not exactly that way. I did not think that we had sufficient time to prepare the case. I did not think that at all, but I
36 did think that the attorney-general's office and the sheriff had very fully and fairly acquainted us with the proof that they expected to rely on, and we had tried in the same frank way to lay our proof before the attorney-general's office, but I did not think in a capital case that we had the time that we wanted between the time of my appointment and the day of the trial, and I think I stated in both of those interviews with the judge and attorney-general, yourself, and the sheriff, that I had gotten up before day in the morning to run down witnesses; that I had spent my money and my time on this trip to Nashville, and that I had not had a moment's rest and that we ought to have more time. I think I stated that.

Q. Isn't it a fact that on the last day of the trial, along towards 11 o'clock, you stated to the court that you understood that a certain gentleman knew certain facts that would be material to the defense and asked for the case to go over until the afternoon, and didn't the court willingly allow that to be done and adjourned until 1.30?

A. Yes; and Judge Shepherd and I, without getting any dinner, went to look for that man and failed to find him. That is right.

Q. It is charged in this petition that when Miss Taylor was asked to come back on the witness stand that the court compelled the defendant to get up and walk around in front of the witness and stand before her and put his hat on before she answered the questions asked her as to whether or not he was the man that assaulted her. Is that true?

A. All I know about that is my attention was called to this juror. He asked for that to be done, and the defendant came around and the juror asked that he put his hat on, and he did so; but whether anybody but the juror said anything I do not know.

37 Q. At any event, you do not remember anything about the court directing the defendant to do this?

A. No; my attention was called to what the juror was doing, and I know the request of the juror was complied with by the defendant.

Q. And his counsel did not object to that proceeding, did they?

A. No; I do not recall any objection being made. I made none.

Reexamination:

Q. When you were in the meeting with the judge and attorney-general and discussing the danger of our objecting to the jury and applying for a change of venue, etc., didn't all the gentlemen at that meeting concur with us that it was a dangerous performance to make those pleas?

A. I understood so, but do not know what was said by the different ones present, and that was one thing that moved me; that those were dangerous measures to take.

Q. That was concurred in by the judge and attorney-general, and they made no objection to it?

A. I do not know whether you could say they concurred in it, but that was our judgment.

Q. And we wanted to present an affidavit challenging the traverse jury, and would have done so, but for the danger that would have resulted to the defendant. How is that?

A. Just as I said just now we did not take that course for the reason that we did not take the other courses—that it would have meant a public hearing.

38 Q. A part of the program was to file a plea in abatement and challenge the traverse jury, wasn't it?

A. I do not know what was done in the Westfield case. The only thing I knew was the plea with reference to the colored men being excluded from the jury.

Judge SHEPHERD. I wish to have your honor consider the last census taken, which will show that there are a little over 15,000 persons, male white people, within the jury age in Hamilton County, Tennessee, and 5,000, or something over, of colored male citizens of Hamilton County within the jury age.

39 J. P. PEMBERTON, the next witness called, being duly sworn, deposed as follows:

Q. How long have you been the deputy clerk of the Circuit Court of Hamilton County, Tenn.?

A. Nearly three years.

Q. Did you have any connection with the clerk's office of the Criminal Court before that time—before you came to be a deputy clerk in the Circuit Court?

A. I was connected with various offices for a good many years.

Q. I will ask you to state if you are the deputy that has charge of keeping the minutes of the criminal division of the Circuit Court and looking after the criminal affairs.

A. Yes, sir.

Q. Have you known of the drawing and empaneling of juries under the act of 1899 since you have been in the office of the clerk?

A. Yes, sir.

Q. Do you issue all the venires for the summoning of the jurors that are drawn?

A. Yes, sir.

Q. And you keep the minutes of the jury commission, don't you?

A. They do not keep any records at all, Judge.

Q. Do you assist them in drawing the jurors?

A. Yes; the clerk of the court is the secretary of that commission.

40 Q. Does that apply to the Circuit Court as well as to the Criminal Court?

A. Yes, sir.

Q. And you spread the names of the jurors on the minutes of the court, do you?

A. Yes, sir.

Q. And then from time to time during a term of the court, when you need additional jurors, do you have anything to do with drawing them and putting their names on the minutes of the court?

A. If an extra juror is needed the jury box is brought into court by direction of the court, and from the box the names are drawn by a little boy.

Q. Do you know how many names are put in the box?

A. They have something like 4,000 in there this time.

Q. Since you have been connected with the court there, and since the passage of this act of 1899, have there been any colored citizens of Hamilton County drawn on the juries?

A. Yes, sir.

Q. How many?

A. I could not say.

Q. How many do you know of?

A. Those names were drawn by the commission, and the jury tickets do not say whether they are white or black, and they are passed over to the sheriff and he returns those lists to us.

Q. I understand that, but how many colored men since you have had any connection with the Hamilton County juries have been drawn on the juries?

A. I can not answer that.

Q. How many do you know of?

A. At the September term a colored man served on the jury for two weeks.

41 Q. Who was he?

A. Will Campbell, from Soddy.

Q. He was almost white, wasn't he?

A. I am not an expert on that, Judge.

Q. You did not know that he was a negro until after court had adjourned, did you?

A. I did not know it until someone told me.

Q. And you are a Virginian?

A. Yes, sir.

Q. What other negro has served?

A. I do not recall another one, but a man by the name of Painter was drawn, but the sheriff could not find him.

Q. And Painter and Campbell are the only two in that time that you have seen serving on the jury of the criminal court?

A. Painter did not serve.

Q. But the white negro did?

A. Yes, sir.

Q. Wasn't there some kick about his having to sleep with the balance of the white men on the jury?

A. I think there was some aristocratic gentleman on the jury that did not like it.

Q. When it was found out he was released by the judge, wasn't he?

A. I think he served his full time.

Q. So you got two negroes out of the full list?

A. I did not get them; the jury commission got them.

Q. They got just two?

A. That is all I know of.

42 Cross-examination:

Q. I believe you stated that there were about 4,000 names put in the jury box?

A. I think last January a year ago there was.

Q. They have not been near all drawn out, have they?

A. Each term of the court Judge Allison orders 200 drawn and Judge McReynolds orders 250 drawn, and if the 250 run short he orders the box brought in and some more names are drawn from the box.

Q. How many terms have you had since the 4,000 names were put in the box?

A. March and September of 1905, and January of 1906.

Q. Then only about 250 are drawn out of the 4,000 for each term of court?

A. Yes, sir; about that.

Q. How many out of that number are summoned?

A. Well, the sheriff in his returns would get some dead, some left the country, and he would probably get 100 out of the 250.

Q. In the names you would give to the sheriff would you have any means of knowing whether they were white men?

A. No, sir.

Q. And how many were colored men?

A. No, sir.

Q. May be 200 or 500?

A. Yes, sir.

43 N. W. PARDEN, colored, the next witness called, being duly sworn, deposed as follows:

Q. Tell what you know about efforts to appeal this case for Johnson after his other lawyers had deserted him. Tell how you came to be connected with the case as attorney for Johnson, and what you did to get an appeal.

A. Johnson was convicted on Friday. Saturday morning Johnson's father came to my office and wanted me to take the case. I was some time considering it before I would consent to do so, and Monday morning I went up to see Judge McReynolds—Hutchins and I together—and I told the judge that there was quite a good deal of dissatisfaction on the part of a good many of the people as to whether or not Johnson was guilty; and I said, "Judge, I would like to relieve you and the attorney-general of the responsibility of this man being hung;" and he asked me to come back the next day, and I did

so; and as he came in his office that morning some one was with him, and Hutchins and I waited on the outside of the door; and as he came out of his office he said, "Do you want to see me," and I said, "Yes," and told him about wanting to file a motion for a new trial; and he said you will have to do that in open court; and I went around and sat down, and court was opened, and I waited for an opportunity, and rose and called the attention of the court, and said: "May it please the court, I desire to file a motion for a new trial in the case of The State v. Johnson;" and then it was that Mr. Daniels rose and asked me by what authority I appeared there for Johnson, and I told him by no better authority than that of the father of the man; and Judge McReynolds said, "You are too late;" and I said, "Judge, I am within three days," and he said, "No; this
44 is the fourth day; and I said "Sunday is always excepted;" and he said, "No; Sunday is not excepted," and said that was the fourth day; and I said, "The man was convicted on Friday, and there has been only three days except Sunday since the man was convicted," and he said, "I will not allow you to file your motion." I spoke to him about a writ of error, and he said, "You know your course," and then delivered a long opinion as to the ability of the lawyers who had represented Johnson, and that Johnson was satisfied, and that he would not allow the motion for a new trial to be filed.

Q. Did you see Johnson after that and inform him what you had done for him?

A. Yes, sir.

Q. Did he approve it?

A. Yes, sir. I came to Knoxville the next week, and I had a petition for a writ of error and supersedeas. I left here last night two weeks ago and had a talk with him, and by his consent I further pursued the case. I went to Nashville and presented my case to the supreme court, but for lack of a bill of exceptions I could not accomplish anything. Judge McReynolds had left the State and was in Florida. Court had adjourned then.

Cross-examination:

Q. So you did not appear before Judge McReynolds until Tuesday, after the prisoner was sentenced on Friday?

A. Yes, sir; I appeared before him on Tuesday.

Q. You never took your motion out of your pocket, did you?

A. I had it in my hand while I was talking.

Q. Did you ask him if you could file a motion for a new trial?

A. Yes, sir.

45 Q. At that time you had not seen the prisoner, had you?

A. No, sir.

Q. And you had no authority from him to appear in the case?

A. Not from him, but from his father.

Q. And that was all the authority you had?

A. Yes, sir.

Q. You did not know whether it was his desire to have a motion for a new trial filed, did you?

A. Yes, sir. My knowledge is this: The morning after Johnson was convicted I had occasion to go to the jail, and he spoke to me

about the matter and said he wanted his case to go up, but did not employ me to do so, and that afternoon sentence was pronounced upon him.

Q. And after he was sentenced, you did not know what his wishes were, did you?

A. No, sir; because he had been ordered taken to Knoxville by the court.

Q. Did you draw this petition?

A. Yes, sir.

Q. Did you compose the language in this petition?

A. I did not say that I composed all the language in the petition.

Q. Who did?

A. I had the assistance of other counsel.

Q. Who were they?

A. I went down to Hutchins' office and he drew part of it, and Judge Shepherd helped us draw some of it.

46 Q. So Judge Shepherd helped you draw it?

A. He only gave us the facts about what occurred, and I also went to see Mr. Cameron and he gave us some information.

Q. Isn't it a fact that Judge Shepherd prepared every word of this petition and you copied it?

A. No, sir.

JUDGE CLARK. Is that material?

Mr. DANIELS. We think it might be, your honor.

A. I went to Judge Shepherd and begged him to come in the case, and also went to see Mr. Cameron and he refused to do so.

Q. You did not present any bill of exceptions to Judge McReynolds, did you?

A. No, sir; because he left town in a few days.

Q. Don't you know that he did not leave town until Friday night of that week?

A. I say in a day or two after that. It was only three days.

Q. Didn't you make the charge in this petition that he adjourned his court immediately and went to Florida?

A. I say immediately for this reason: I had a case in court of a woman being charged as accessory to Ed Smith, who was convicted of rape, and she was in jail and the lawyers had been wanting a continuance, and as soon as Smith was convicted, sometime between Monday and Friday, and just as soon as Smith was tried, Judge McReynolds continued all the cases and allowed this bond to be reduced from $5,000.00 to $1,000.00——

Q. Isn't it a fact that Judge McReynolds' court was open all that week up until Friday?

A. Up until Friday morning.

47 Q. Didn't he have the court open on Friday morning?

A. I was there Friday afternoon and court was not open.

Q. Did you at any time say anything to Judge McReynolds about a bill of exceptions?

A. No, sir; I did not.

Q. Although you knew that he was in the city from Tuesday until Friday night, you took no steps to get a bill of exceptions?

A. Yes, sir; because I went and paid Mr. Morrison $80.00 to fix up the transcript in order to get some information in regard to it.

Q. You knew that Judge McReynolds was going to leave on Friday night, didn't you?

A. Not until Friday, when I was there.

Q. Did you say anything to him about wanting to present a bill of exceptions later?

A. No, sir; when he was on the bench I spoke about it, and he said you know your course.

Q. Did you make any request that he stay there until you could present a bill of exceptions?

A. No, sir; I did not have the time.

Q. Did you write to him while he was in Florida?

A. I did not know where he was in Florida. I only knew he had gone to Florida.

Q. Did you make any inquiry as to where he was?

A. I thought that was useless, because if he would not allow me to file my motion for a new trial I knew he would not——

Q. You are testifying that you were in time, when the rule required that the motion should be filed within three days?

48 A. Yes, sir; what little knowledge I have is that Sunday is excepted.

Q. So you are swearing that if you make the motion within three days after the conviction—that if you appeared on the next Tuesday—that was in time?

A. Yes, sir; three days—Sunday, Monday, and Tuesday.

Q. Say you had a talk with Judge McReynolds on Monday morning?

A. Yes, sir.

Q. Did he tell you then that you must file your motion within three days?

A. No, sir; he told me to come back the next day, and the next morning when he came out of his office with Rev. Freeman——

Q. Didn't you say you wanted to see Mr. Whittaker about it?

A. Yes, sir; Judge McReynolds said, You see Mr. Daniels, and I said, No; I will wait and see Mr. Whittaker.

Q. You wasn't mad at me, were you?

A. No, sir; but I have been in Chattanooga fifteen years, and I have never been able to get a concession from you in any way.

Q. You were looking for concessions, then?

A. I thought Mr. Whittaker would reason the matter out better than you would.

Q. When the court told you that it would not allow you to file your motion for a new trial you said you wanted a writ of error, didn't you?

A. Yes, sir.

Q. You didn't say anything about a bill of exceptions, did you?

A. Yes, sir.

49 Q. And that is your idea about the way to get it up?

A. Of course I know that you have to get a bill of exceptions before you can get a writ of error.

Judge SHEPHERD. May it please the court, I would like to treat as read the order of the criminal court, in order to show that at the moment of that order notice was given of a motion for a new trial.

Judge CLARK. You may treat that as in if you know it to be that way.

Mr. WHITTAKER. We will admit that.

The petitioner here closed.

50 *State's evidence.*

M. N. WHITTAKER, the next witness called, being duly sworn, deposed as follows:

Q. Are you the attorney-general for the sixth judicial circuit of this State?

A. Yes.

Q. I will ask you to commence with your testimony by stating what occurred in the conferences between yourself, Judge McReynolds, Judge Shepherd, Mr. Thomas, Dr. Bachman, and others in relation to the trial of Johnson?

A. There was a conference of that kind held, which has been described by some of the witnesses, and it was suggested that they desired to interpose a plea in abatement to the indictment, raising the question that there were no negroes in the jury box. It has been stated by Mr. Thomas that they wanted to take the same course that was taken in the case of The State *v.* Westfield. Mr. Thomas makes a slight error about that, because I had no agreement with Judge Shepherd or anyone defending Westfield that any particular course be taken in that case. They filed such a plea as that in the Westfield case, and on account of an error appearing in the plea I moved to strike it, and the plea was stricken. I just state that to show that I had no agreement with counsel in the Westfield case about that, and when counsel for Johnson informed me that they wanted to present that question I said to them: "Gentlemen, that will be a consumption of time for no profit, because if that question is presented by a plea I will take issue on the plea, and can prove by one of
51 the jury commissioners that the names of quite a number of negroes were put in the box, and I can further show that some negroes have served on the jury since the box was filled. The plea was made to me either by Judge Shepherd or Mr. Thomas, or both, that that being the case they did not care to file that plea. Therein I differ somewhat from Mr. Thomas. In the course of that conference and several others of the same character, it seemed that counsel for the State and for the defendant were anxious to ascertain really the man that had committed this outrage, and I departed from my somewhat stern custom never to relate anything that I know about a case to the other side, but told the gentlemen that on account of their complaint that they were not having time enough to prepare their case that I wanted to put them in possession of every fact that the State knew, and, aided by the sheriff, and in the presence of the judge, the sheriff and I related to them every fact that we knew in

the case that tended to establish the guilt of the defendant; told them by what witnesses we could prove it, and told them where the witnesses lived, so that they might have an opportunity to interview the witnesses and find out whether or not what we related to them was true and whether we could prove it. This was done because they were complaining that they did not have time enough to prepare the case.

Q. What, if any, threats were made by either you or Judge McReynolds in that interview, or in any other interview, as to what would be done if they pursued the course they suggested?

A. No threats of any character, of course, were made by either myself or the judge or anybody else that had any connection with the case.

Q. After the advisory committee was appointed state whether or not you were present in the judge's office when Mr. Thomas came back and reported what had taken place at their conference.

52 A. I was.

Q. State what he said at that time.

A. My recollection of Mr. Thomas's statement, and I think that I am correct about it, is that after Judge McReynolds had appointed this committee at the request of Mr. Thomas, that after they had their meeting Mr. Thomas returned to the judge's private office, and I was there, and he said to the judge, "We have had our consultation and we have all agreed unanimously that there is no error in this record; that there is no error in the matter of admitting testimony, or in your charge, and if you are satisfied with the verdict of the jury in this case you can proceed to pronounce sentence upon the prisoner. We will not take any steps toward appealing the case."

Q. State whether or not the prisoner was then brought over and sentenced.

A. Mr. Thomas then said that he wanted to go over to the jail and tell the prisoner of their conclusion, and the judge told him "very well;" so he said he would not be gone long, and he did go, I suppose, over to the jail, and he came back and reported to the judge that the defendant was ready and willing to be sentenced, if he concurred in the verdict of the jury, and the judge then went to the court room where the defendant was, and court was opened and Mr. Thomas got up in the presence of Judge Shepherd, who was present, and made the statement to the court that no application for a new trial would be made, and that if he concurred in the verdict of the jury he could sentence the defendant. The court, after commenting upon the evidence, proceeded to sentence the prisoner.

Q. State whether or not Mr. Thomas, before going over to the jail, said to you and Judge McReynolds that he thought the

53 prisoner had had a fair and impartial trial.

Judge SHEPHERD. I object to that question, because it is not competent to prove that by Mr. Whittaker.

Judge CLARK. I will let that go in for just this purpose: I do not understand there is much implication here against anybody, but there is an implication of two things; that there was great haste in this trial, and that the trial was had under a kind of species of ap-

prehension on the part of the counsel. You may ask him. That counsel were to an extent terrorized on account of the fear of a mob. Let him answer the question.

A. I think the connection in which Mr. Thomas said that was when he asked the judge to appoint additional counsel to confer with them. The judge hesitated about doing this, and suggested that he had already appointed, it seemed to him, sufficient counsel to protect the rights of the defendant, and Mr. Thomas said he would take it as a personal favor if he would appoint these men as an advisory counsel as to what action they should take about the case, and the judge suggested to him that he had been somewhat criticized by one of the lawyers in the case in his argument before the jury, and Mr. Thomas said, "You never heard of me criticising you, Judge, because I have not. I think you have given us a painstaking and a fair and impartial trial in this case."

Q. In the first interview that you had with these gentlemen, state whether or not the judge informed the petitioner's counsel that he was not going to grant a change of venue and was going to try the case on the day fixed.

A. I do not remember anything like that. I know this: Judge Shepherd, and perhaps Mr. Thomas—I know that Judge Shepherd in some one of these interviews said to me that he felt like it was the duty of the judge and the attorney-general to change the venue
54 in this case and to let the case be continued, and I told him that I did not feel that way about it; that I felt like the law's delay already in respect of all cases of this kind had engendered whatever mob spirit existed throughout the country on account of offenses like this, and if we could have speedy trials, rather than to delay them, it would have a good effect on the public with reference to allaying in the future any such mob spirit as generally existed in cases of this kind.

Q. State whether or not these gentlemen were terrorized by any threats made by either you or the judge in the event they pursued the course they suggested.

A. As stated, we made no threats, and, as stated in the answer to the petition, I can not imagine how Mr. Thomas or Judge Shepherd could have been terrorized from a proper and legal defense of their client under any condition that might have existed, knowing them as I do.

Q. It is also charged in this petition that these officers, meaning yourself and Judge McReynolds, caused an inspired article to be published in the Chattanooga Times that the prisoner would be tried on the day set. State whether or not any such statement as that was made.

A. That charge is untrue, as far as I am concerned. Judge McReynolds will have to answer for himself.

Q. State whether or not, as a matter of fact, you did see such an article.

A. He did not show me any such article, and I did not see the article published, and I did not know that it was written until Mr. Thomas referred to it here on the stand.

Q. Were you present at the jail of Hamilton County when a mob assembled for the purpose of trying to break in the jail?

55 A. They had assembled before I got there.

Q. State whether or not the prisoner Johnson was in the jail at that time.

A. He was not.

Q. Where was he?

A. In the jail at Nashville, was my information.

Q. State whether or not there was any renewal of the attack by the mob?

A. No.

Q. So he was not in the jail at the time the attack was made at all?

A. No.

Q. It is further charged in this petition that at the time Johnson was brought out to be sentenced that he said to the court, "I am not guilty." Did he use that language?

A. No; he did not use that language. My recollection of the language he used is that said he supposed he had had a fair trial, but he was innocent, but someone had to suffer for this, and I reckon it might as well be me.

Q. Something was said by Mr. Thomas about you saying to him that you had talked to the governor about sending troops, and he refused to do so, and said that he thought the case ought not be tried, or that it ought to be tried in Nashville.

Q. Mr. Thomas said something in his testimony with reference to a change of venue, and said it ought to be changed to Nashville or Knoxville?

A. I do not remember that Mr. Thomas designated the place, but he referred to a conversation I had with the governor. Coming over on the train one night the governor was on and was asking me

56 about the case, and I said something to him about sending troops, and he said that he was not going them, and that from the best information he could get the militia was not needed; that the temper of the people of Hamilton County was such that that man could have a trial there without the aid of the militia, and he said, however, that he would come over in person if the trial should be deferred until the following Friday. That was on Monday, but the governor never said a word to me about a change of venue to Nashville or anywhere else. As a matter of fact a change of venue would not have taken the case to Nashville, and somebody realizing that rule of law suggested Sequatchie County. I did not so report it to Mr. Thomas.

Q. About how many people attended Johnson's trial on the various days that it progressed?

A. I do not know. About, as stated by some witness here to-day; on the first day not a great many people were there. I suppose 150 or 200 people, and everything was proceeding so quietly and calmly that the rules were somewhat relaxed, and the crowd grew to be some size, and when Judge Shepherd argued the case it carried quite a crowd there.

Q. It is charged in this petition that the father, mother, and other friends of the prisoner were denied admission to the courtroom and not allowed to attend his trial. Is that true?

A. That is not true. I did not know he had a father, mother, or any relatives of any character until the filing of the petition in this case.

Q. State whether or not any application was made to you or to the court for permission to attend the trial?

A. None was made to the court, to me, or anybody else that I know of.

57 State the facts with reference to Miss Taylor when she was called back on the witness stand before the trial ended.

A. Juror Wrenn said just a short while, perhaps 10 or 15 minutes, before the evidence closed, that he would like to have Miss Taylor brought back on the stand. She was brought back, and then he wanted the defendant to come around and stand in front of her, and the sheriff said to the defendant, as I remember, "Ed, come around," and the defendant got up and walked around in front of Miss Taylor, and the juror said, "Put on your hat," and he did so. Thereupon Juror Wrenn said to Miss Taylor, "Is that the man that outraged you?" She said, "I think he is the negro," and Juror Bearden at this time become considerably excited, and said; "Miss Taylor, will you swear before God that that is the man that outraged you?" and he was crying when he asked the question. The juror was crying, and he made some motion to get out of his seat, and the juror that sat next to him put his hand on his shoulder and he sat down, and Miss Taylor, with the most remarkable composure I ever saw, waived her hand that way [illustrating], and said: "Gentlemen, listen to me; I would not be the means of taking the life of an innocent man, but before God I believe that is the negro." I had the stenographer run that off for me, and I think that is the reason I remember it so well.

Q. State whether or not he was compelled or requested to stand in front of her by the judge.

A. No; I know he did not make that request, and do not remember of the judge interfering in any way, and not the slightest objection came from the defendant, his counsel, or anyone else to the request of the juror in this regard.

58 Judge S. D. McReynolds, the witness called, being duly sworn, deposed as follows:

Q. Are you the judge of the criminal court at Chattanooga?

A. I am.

Q. And you are the judge that presided over the trial of this man, Ed Johnson?

A. I did.

Q. State to the court whom you first appointed as counsel to defend this man.

A. This crime, as I remember it, was committed on Jan. 23rd, and on the 25th Sheriff Shipp came in the court room and told me that he had arrested some two people charged with this crime, and

I told him that I would make an order to have those people carried to Knoxville for safe keeping, which he did that night or afternoon. When this party was carried to Knoxville, or to Davidson County, on Saturday after this crime I appointed Bob Cameron, who was in my office at the time. On Monday thereafter Judge Shepherd came in my office and said to me: "Judge, it strikes me that you ought to appoint some older lawyers to defend this man; why not appoint somebody like Mr. Pritchard," and I said, "Judge, I would be glad to do so, but this a job that many lawyers do not want; why don't you take it yourself? He said, "Well, I might if some of these other lawyers would serve with me," and I said, "If you will see them about this matter and get some of them to serve in this case I will appoint you." He went off and approached me the next day while I was on the bench and said, "Judge, if you will appoint me and W. G. M. Thomas we will represent that negro." I said,
"Judge Shepherd, in a few minutes I will let you know about
59 it." In a few minutes I called Judge Shepherd and said,
"How do you know Mr. Thomas will serve?" and he said, "I am satisfied he will serve," and I think he stated that he had had a conversation with Mr. Thomas, and so I appointed them. When I appointed these attorneys Judge Shepherd came back—the young lady had been carried to Nashville to see the prisoner, and a day or two after that they came into my office, and in order to see that they had all the facts in this case I requested Sheriff Shipp, in the presence of these three attorneys, to go into details as to every item of proof which the State had, the witnesses by whom they could prove these facts, what had occurred with reference to the identity of this negro at Nashville, and this was done, and these three gentlemen were given all the proof which the State had at that time. The next conference which they refer to, and if your honor will permit me, where they say I passed on any matters in my office, is absolutely false. I want to deny that part of the charge. Anyone can make an infamous, slanderous statement like the one contained in that petition, but it is a different thing to have it proven. They came in my office to talk to me about when this case ought to be tried, which has been discussed and related on the stand here. At that time I want to say further that the charge in that petition that I said I would not grant a change of venue, nor continue that case, but had to be tried on a certain date; I want to say that that is an infamous falsehood, and I believe the man that wrote it knew it. It is true that I told them my opinion about these matters, but I never passed on them. We thought of trying the case on Friday, and they wanted it passed until Tuesday, and finally they said they thought they could get ready by Tuesday and agreed that the case should be tried on that
date. On Tuesday morning Johnson was brought back to
60 Chattanooga. When I opened court Tuesday morning Mr.
Thomas got up and made a statement just about like he stated here on the stand, and I said "Mr. Thomas, if you want the court to pass upon an application for a change of venue, or a continuance, you must make your application in the usual way. The State has announced ready and if that is all you have to say we willl go into the trial of this case."

In reference to the crowd which was kept out of the court room, I talked to the attorneys for the defendant, and it was by their advice and agreement; and I wanted to know how they felt about it; but in reference to keeping this defendant's mother and father out of there, that is absolutely false, as I did not know he had a father and mother until days afterwards. I could state when I first found this out, but that is perhaps not necessary. Of course they would have been admitted to the court room if they had come there. Other people were admitted. The case went on for about three days. On the last day of the trial, about 11 or 11.15, all the proof for the defendant was in except they had a hunch that they could prove some statement of facts by some other witness. At their request I adjourned court, instead of requiring them to close, until 1.30 that evening, and they came in and reported that they had seen this party; and I wish to say right here that the jury which tried this negro was one of the best juries that I have ever seen. As an evidence of the class of men that composed that jury, one of them was past grand chancellor of the Knight Templars of the State, and another was commander of a Knight Templars lodge in my city, and one—Mr. Bearden—was an architect, and I believe in all there were seven Masons on that jury, and it was just that class of men that composed that jury. The jury returned their verdict on Friday morning. Judge Shepherd, Mr. Thomas, and Mr. Cameron said that they—I believe Judge
61 Shepherd said he wanted to give notice of a new trial when they left the court room. A little while later Mr. Thomas came back to my office and requested that I appoint an advisory committee for them, as he would like to have some of the good lawyers of the city to advise with them. I felt at that time that I would like for the attorneys to take some of the responsibility themselves, because when the case opened up they attempted to shift the responsibility on me, but finally, at the personal request of Mr. Thomas, I said I would do it, and this is the committee which is termed as my "advisory committee." Mr. Thomas said "Any competent lawyers would do," and I said "I will appoint Mr. Cantrell, an old partner of mine, Mr. Brown," and I think then Mr. Thomas spoke of Mr. Sizer, and Mr. Whittaker spoke to Mr. Pritchard, and I said "Perhaps Mr. Pritchard will be the better man on this committee, from the fact that he knows more about the criminal law," and I said "I will appoint those gentleman;" and Mr. Thomas said "Will you notify them, Judge?" and I said I would.

Q. What did Mr. Thomas say with reference to these men being satisfactory?

A. He said they were entirely satisfactory. I had not talked with any of these gentlemen in reference to this case, and I asked Mr. Thomas where he wanted them to meet him, and he said at Mr. Cantrell's office at 1.30. I called up Mr. Brown, and the attorney-general called up Mr. Pritchard, and I also called up Mr. Cantrell, and told them to meet at Mr. Cantrell's office at 1.30, and the meeting occurred, and Mr. Thomas returned to my office somewhere about 3.15 in the afternoon. He told me the result of this conference and that they had been down there perhaps some two or three hours. I be-

lieve he said they had concluded that it was useless to appeal this case to the Supreme Court; that they had gone over all the matters and that could find absolutely no error in the record, and
62 that the only thing it would serve would be to prolong the life of the man, and that the facts were sufficient, as proven, for the Supreme Court to affirm the case. I made some remark to Mr. Thomas at that time about some little criticism, and he said "Judge, you have not heard any from me," and I make this statement only for the purpose of trying to protect myself, and Mr. Thomas said "Judge, you have not heard any from me; you have given us every facility to get our proof in and have given us a fair, painstaking, and impartial trial." He then went over to the jail and told me what he was going to do over there, and I think that Mr. Pritchard went over to the jail with him, and when they came back and I went into the court room Mr. Thomas got up and made a statement similar to what he stated here on the stand, and with the usual form, and going over the case to some extent, I sentenced Johnson to hang on the 13th of this month. I never heard anything about any other attorneys getting this case until Monday morning. At that time Parden and Hutchins came to my office and said they wanted to relieve me of the responsibility of this man being hung, and Hutchins said "Judge, you will give us thirty days to make out a bill of exceptions, won't you," and Parden said "I want to have a talk with you and the attorney-general to see if we can not arrange to appeal this case without bringing Johnson back from Knoxville. I said "I will not discuss this matter privately with anyone, and Mr. Whittaker is not here to-day," and Parden said "I do not care to talk to Mr. Daniels," and I said "You must bear in mind that you must give such notice on the first day that a motion for a new trial will be filed, which is within three days thereafter. You must file your notice, stating specifically all the grounds to be relied on. Hutchins then said "Sunday is not counted, to-morrow will be in plenty of time," and I never said a word, as it was not my
63 duty to advise him. On the next day Parden stopped me on the outside of my office, and I told him to wait until court opened, and he came in and said he wished to make a motion for a new trial, and Mr. Daniels objected, on the ground that he had no authority to represent the defendant, and further, on the ground that it was not filed within the time. I refused to allow him to file the motion, because he had not complied with the rules of the court, just the same as I have enforced the rule in other cases, and some men are in the penetentiary to-day from the enforcing of that rule. He parleyed with Mr. Daniels for some time, and, when I told him to cease, I went into the case somewhat to show what I had done to give this man a fair trial, and he then said "We would like to have a writ of error," and I said "You will have to get that from another source." That was on Tuesday, and I had arranged to go to Florida on Friday night.

Q. After the trial of this man Johnson, wasn't there another case tried against Smith?

A. This case against Smith—he was charged with attempted rape on a little girl. That was on trial when Parden attempted to get his

motion filed, and it was in that case that a challenge was made to a plea in abatement, which was filed, and the attorney-general joined issue as to there being no negroes in the jury box, which went to the jury, and that issue was found in favor of the State.

Q. You say you left for Florida on Friday, after this motion was made?

A. Yes; and not another word did he, or anyone else representing Johnson, say to me in regard to appealing that case, and no bill of exceptions or anything of that kind was presented to me, and
64 my court was open on Friday, and I had arranged to go to Florida on Friday night, and he knew I was to go then.

Q. What time Friday did you leave?

A. At 6 or 7 o'clock that night.

Q. Did anyone accompany you?

A. My wife and brother-in-law.

Q. Was it known to what point in Florida you were going?

A. It was in the Times the next morning.

Q. Did you ever receive any communication from any of the counsel for Johnson that they desired to take any steps about this matter?

A. No.

Q. Did they request you to return to Chattanooga so that they might?

A. Certainly not.

Q. Tell the court about this inspired communication to the Times that has been inquired about.

A. We did not do it. The only thing I ever had anything to do with was at the request of Mr. Thomas, in giving out a statement that the public would not be admitted to the court room.

Q. With reference to the article that Mr. Thomas wrote for the Times, what do you know about that?

A. Judge Shepherd was standing to the right of my stand in the court room, and Mr. Thomas came up and showed an article which he had written to Judge Shepherd, and something occurred in the court room at that time, and I turned around and Mr. Thomas turned it over to me, and Mr. Thomas said he proposed to write some articles for the paper, because he thought it would have a good effect.

65 Q. What about the charge in this petition that counsel were alarmed by threats made almost ex cathedra from the bench?

A. I never made any ex cathedra or any other kind.

Q. There is some charge about getting the negroes off the jury?

A. All I know is that I have appointed three as good men as I thought we could find as jury commissioners. We have absolutely nothing to do with the drawing of the juries. When we want a jury we make an order that the jury commissioners draw so many jurors, and I have absolutely nothing to do with it. I want to say that I have heard the report circulated that there was a negro by the name of Will Campbell on the jury, and I did not discover that he was a negro until about a week after he had been serving, and I heard that the report had been going around—I heard it to-day—that as soon as I discovered he was a negro that I ordered him released. I want to say that is absolutely false. He served his two weeks out.

Q. What about some other negroes?

A. I do not remember seeing any negro there on the jury, but I think there was one other that asked to be excused on account of being hard of hearing. The first term I ever opened court there, about three years ago, and before I was familiar with the jury law, I met a negro one morning as I was going into the court room who told me that he had been summoned. He had been raised over in my town, and he said he would like to go home, and I said, All right, go on, Sam; and I think that was the first day I opened court in Chattanooga.

Cross-examination:

Q. Have you been the judge of the criminal court there ever since the jury law of 1899 was passed?

A. No.

66 Q. You were a practicing attorney?

A. Yes.

Q. Can you state any other negroes that served on the jury except this man Sam and Painter?

A. I do not remember of but one serving on the jury, and his name was Will Campbell.

Q. All that has ever served since that jury law was in force is that one negro that you did not discover was a negro until he had served for two weeks?

A. He served one week before I discovered that he was a negro. I do not think that there has been but one negro in my court since I have been judge.

Q. Do you know of any in the circuit court?

A. No; I do not remember about that. I know that there is a lot of names drawn and a certain number summoned, and I do not know whether they are negroes or not.

Q. This Soddy man, he made an application to you to be released and you overruled it, didn't you?

A. It strikes me that on Friday evening or Saturday afternoon, but I told him to come back, and I did keep him there all the next week; kept him for two weeks.

Q. Didn't some of the court officials come to you and say that you did not understand the purpose of the application?

A. I do not think he is the one.

Q. Did that occur with any negro?

A. Yes; I think something of that kind did occur with one by the name of Pattie.

Q. Didn't you meet Pattie before he got to the court-house

67 and tell him that he would be excused?

A. He asked me to be excused and wanted to go home, and I had known him all my life and I let him go.

Q. Those two are the only ones, then?

A. Those three are the only ones that I can recall. They told me the other one was a negro, and Ben McGill told me that he had a wife as black as the ace of spades.

Q. And Sam Pattie is the other one?

A. I am not sure that he is the one, and there is another whose name I do not remember.

Q. Was he excused?

A. That one was excused on account of being hard of hearing. Some of the men said they got him to make that affidavit.

Q. Didn't you in this case order the jury box brought in and order 100 or 200 extra men to be drawn by the jury commission?

A. I do not remember whether I did or not. I did in some of those cases; I am sure I did in the Westfield case. Perhaps the clerk can tell you about that.

Q. That jury box is revised once every two years, isn't it?

A. It is supposed to be. I think it is supposed to last two years. The jury commission attends to that. If it runs out they fill it up.

Q. Do you know how many names are in the jury box?

A. No; only from hearing Mr. Henderson say from 3,800 to 4,000.

Q. Those names are put in a revolving drum and you draw out how many for each term of the criminal court?

A. I generally make an order for 250, and very often we have to draw 50 or 100 more.

68 Those names that are drawn are put into another compartment and saved, are they not, and you keep on drawing until you exhaust the box?

A. No; those that are excused, their names go back in a blank envelope and are put back in the box. Those that serve two weeks, their names are kept out.

Q. And you keep on with that process until the jury box is exhausted, and it is only filled about every two years?

A. It was filled about last January, a year ago.

Q. Something has been said here about the fact that you were offended because I had criticised your conduct of that trial. Did I do anything except to object to your interrogating the witnesses on the attorney-general's side?

A. It is quite a long story, Judge. Judge Shepherd, it was not for the purpose of——

Reexamination:

Q. Judge Shepherd asked you if the names of the jurors were not put in a revolving drum. All the names are put in a blank envelope, are they not?

A. They are put on a card and are then put in an envelope and then put in the drum, and there is nothing on the envelope to indicate whose name is in there, and they are drawn out by a small boy.

This was all the evidence in this case.

69 After argument of counsel the court dismissed the petitioner's petition and remanded him to the custody of the State officials by the following order on the minutes:

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

ED JOHNSON, v. STATE OF TENNESSEE. } No. 1460.

On this the 10th day of March, A. D. 1906, this cause came on to be heard upon the petition, return, answer, and replication and upon

the testimony of witnesses given orally in open court, and, after argument of counsel, the court being fully advised in the premises, is of the opinion that said petition is not well founded, and that the same should be dismissed and that said writ of habeas corpus should be denied and that the petitioner be remanded to the custody of the sheriff of Hamilton County, Tennessee, to be detained by him in his custody for a period of ten days, in which to enable the petitioner to prosecute an appeal from this order, if he may be advised that an appeal lies and may so choose, and in default of the prosecution of an appeal within said time, to be then further proceeded with by the State court under its sentence; the order on the sheriff to retain custody of the prisoner for the period of ten days for the purpose above mentioned being made on the application of the prisoner himself.

It is therefore ordered and adjudged accordingly.

Enter this.

CLARK, J.

70 The petitioner then and there excepted to the action of the court and tenders this bill of exceptions, which is signed and sealed by the court and made a part of the record.

This the 15th day of March, 1906.

C. D. CLARK, *Judge.*

UNITED STATES OF AMERICA,
Eastern District of Tennessee, ss:

I, D. L. Snodgrass, clerk of the Circuit Court of the United States for the Eastern District of Tennessee, do hereby certify that the foregoing is a full, true, and correct copy of the record and proceedings in the case of Ed Johnson *v.* The State of Tennessee, as the same appears of record and on file in my office.

Witness my hand and the seal of said court at office in Knoxville, Tennessee, this 15th day of March, A. D. 1906.

[SEAL.] By D. L. SNODGRASS, *Clerk.*
W. L. EDINGTON, *Dep. Clerk.*

The within-named Ed Johnson asks an appeal from the judgment herein rendered in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on March 10th, 1906, denying his application in a writ of habeas corpus. Pursuant to the statutes of the United States the appeal asked is hereby allowed.

71 Given under my hand as an associate justice of the Supreme Court of the United States this March 17th, 1906.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States assigned to the Sixth Circuit.

72 UNITED STATES OF AMERICA, *ss:*

To the State of Tennessee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the circuit court of the United States for the eastern district of Tennessee, wherein Ed Johnson is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 19th day of March, in the year of our Lord one thousand nine hundred and six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Indorsement on cover:) File No., 20136. E. Tennessee, C. C. U. S. Tern No., 228. Ed Johnson, appellant, *vs.* The State of Tennessee. Filed March 19, 1906. File No., 20136.

O

ED JOHNSON *v.* THE STATE OF TENNESSEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 2. Docketed March 19, 1906; Abatement announced May 24, 1909.

Case abated on account of death of appellant.

THIS is the appeal referred to in the statement of the case of *United States* v. *Shipp*, No. 5, original, *ante*, p. 386. The order allowing the appeal was granted and the case docketed March 19, 1906. On that day the appellant was killed under the circumstances set forth in the statement of the case in *United States* v. *Shipp*, *ante*, p. 386. No further proceedings were had in the case. On May 24, 1909, after announcing the decision in *United States* v. *Shipp*, holding that certain of the defendants in that case were guilty of contempt of this court for their conduct in connection with the killing of the appellant in this case, the Chief Justice announced that this case had abated owing to death of appellant.

Mr. E. M. Hewlett was attorney for appellant on motion for allowing the appeal.

THE CHIEF JUSTICE: Appeal abated by death of appellant, and case dismissed.